United Democratic Movement and others v Tlakula and another
2015 (5) BCLR 597 (Elect Ct)

Division:	Electoral Court, Johannesburg
Date:	18/06/2014
Case No:	**EC 05/14**
Before:	WL Wepener Judge, M Mthembu and S Pather, Additional Members

Electoral Commission *– commissioners – removal from office – section 7(3) of the Electoral Commission Act 51 of 1996 – on grounds of misconduct – recommendation of the Electoral Court required by section 7(3)(ii) – failure to serve impartially and independently and perform his or her functions in good faith and without fear, favour or prejudice – section 9(1)(a) – test to be applied by Electoral Court in making its recommendation – conduct had to be evaluated in the light of the concept of accountability – meaning of "accountability" in the context of the Constitution and public administration.*

Editor's Summary

First Respondent, Pansy Tlakula ("Tlakula"), was Chief Electoral Officer of Second Respondent, the Electoral Commission ("the EC"). The EC took no part in the proceedings and elected to abide the decision of the Court.

The Public Protector had found that Tlakula was guilty of maladministration and misconduct in respect of the procurement of premises for the EC. The Public Protector found that Tlakula had presided over a grossly irregular process for procurement of the premises. The process had violated procurement legislation and prescripts. A subsequent forensic investigation by the National Treasury found that the procurement process followed by Tlakula was not fair, equitable, transparent, competitive or cost-effective as required by section 217(1) of the Constitution. Tlakula had not followed the EC's procurement policy. She ran the procurement process herself instead of leaving it to the relevant functionaries. The Public Protector also found that Tlakula in doing so had an undisclosed and unmanaged conflict of interest because she had a close relationship with one Thaba Mufamadi ("Mufamadi") who had an interest in Abland (Pty) Ltd, the company which was eventually awarded the tender ("Abland"). This conflict of interest compromised Tlakula's duty to act in the best interests of the EC. The National Treasury investigation found that as a result of the irregularities, the EC would be overcharged by Abland in an amount between R20,8 million and R110 million over the ten year term of the lease. The Public Protector had also found that the Tlakula's improper conduct and maladministration risked impairing public confidence in the integrity and impartiality of the EC.

Section 9 of the Electoral Commission Act 51 of 1996 prohibits any commissioner from placing "in jeopardy his or her perceived independence or in any other manner [harming] the credibility, impartiality, independence or integrity of the Commission".

Shortly before the elections scheduled for 7 May 2014 Applicants, five opposition parties, approached the Electoral Court with a view to securing Tlakula's removal from her office as a commissioner on the grounds of her misconduct. Section 7(3)(a) of the Electoral Commission Act 51 of 1996 provides that "a commissioner may only be

removed from the office by the President (i) on the grounds of misconduct, incapacity or incompetence; (ii) after a finding to that effect by a committee of the National Assembly upon the recommendation of the Electoral Court."

The Court was thus required to consider whether Tlakula's conduct, as a matter of law, amounted to misconduct warranting her removal from office.

Tlakula's actions in question had been committed while she was the Chief Executive Officer of the EC and prior to her appointment as a commissioner. It was argued on behalf of Tlakula that the conduct which the Court was called upon to investigate was not the conduct in her capacity as a commissioner, and that an investigation could only be held to establish whether Tlakula, *qua* commissioner, was guilty of misconduct. The Court rejected this argument. Conduct which might prove to be misconduct, whether committed after Tlakula's appointment as a commissioner or before, would constitute conduct which was liable to harm the EC. It would be artificial to say that misconduct which came to light after the appointment of a commissioner, which could have impacted on her very appointment had it then been known, and which could have disqualified her from office, could not be investigated by the Court. If the conduct impacted on the credibility, independence or integrity of the EC, the Court was obliged to investigate it. The provisions of section 9 of the Electoral Commission Act 51 of 1996 required commissioners to act according to the prescripts of the Act. A failure to do so would constitute misconduct, irrespective of the time when such misconduct was committed.

As the Chief Executive Officer, Tlakula was the accounting officer of the EC for purposes of the Public Finance Management Act 1 of 1999. She thus was responsible for its financial affairs. The object of the Public Finance Management Act was to "secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions" to which it applied. In addition, organs of State were required in order to ensure compliance with the principles of competitiveness and cost effectiveness set out in section 217(1) of the Constitution to procure goods or services on the best possible terms; and section 195(1)(f) of the Constitution required that "public administration must be accountable". As the accounting officer, Tlakula was responsible and accountable for her actions.

The Court observed that "responsible" meant *inter alia* "answerable, accountable". Tlakula's conduct had to be evaluated in the light of the concept of accountability. The Court considered the meaning of "accountability". Accountability in the context of the Constitution was a wider concept than "responsibility". It meant more than "being called to account for one's actions". Accountability entails an account-giving relationship between individuals,

in the sense that "A is accountable to B when A is obliged to inform B about A's (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct". Tlakula, as a public official, was to be held accountable in that sense. She was obligated to inform the public about her past and future actions and decisions, to justify them, and to suffer punishment in the case of misconduct being found.

The Court considered the evidence and concluded that Tlakula's misconduct had been established on a balance of probabilities. She had wilfully flaunted legal prescripts relating to the procurement process on a wholly insufficient basis. The Court found each of the findings contained in the forensic report to be factually correct. Tlakula had contended that the "flaws" in the process were not indicative of dishonesty, impropriety or corruption. However, the Court observed, the test was whether her actions constituted misconduct. Her continued refusal to be accountable for her actions revealed a failure to appreciate her wrongful conduct. If the conduct amounted to misconduct to the extent that it was at odds with the requirement of the office, it would warrant her removal from office.

The Court concluded that her misconduct did warrant her removal from office and made a recommendation that a committee of the National Assembly adopt the facts found by the Court, as also its views and conclusions.

Judgment

Wepener J:

[1] The applicants in this matter are all registered political parties. They are the United Democratic Movement, The African Christian Democratic Party, Agang SA, Congress of the People and Economic Freedom Fighters. Each of the applicants was duly registered to participate in the 2014 national and provincial elections to be held on 7 May 2014 ("the 2014 elections"). I refer to them as the applicants.

[2] The first respondent is Faith Dikeledi Pansy Tlakula, a commissioner and current chairperson of the Electoral Commission ("the Commission").

[3] The Commission, cited as the second respondent, is a constitutional institution established under Chapter 9 of the Constitution and governed by the Electoral Commission Act[1] ("the Electoral Commission Act"). Its objects are set out in section 4 of the Electoral Commission Act and incudes to:

> "strengthen constitutional democracy and promote democratic electoral processes."

[4] The Commission filed a notice stating that it would abide by the decision of this Court and took no part in the proceedings. Any reference to the respondent is therefore a reference to the first respondent only.

[5] The applicants launched an application in this Court seeking an order in the following terms:

> "2. Recommending that the National Assembly convene an urgent hearing in terms of section 194(1)(b) of the Constitution of the Republic of South Africa, 1996 and section 7(3)(a)(ii) of the Electoral Act 51 of 1996 to determine whether the first respondent should be removed from office as chairperson of the second respondent on the grounds of misconduct."

[6] The respondent resisted the application. During the course of the hearing, Counsel for the applicants applied to amend the relief and requested the court to simply declare that the respondent had misconducted herself within the meaning of section 7 of the Electoral Commission Act and to recommend that a committee of the National Assembly has regard to this finding. The applicants further amended their contentions during the investigation but nothing turns on it.

[7] The applicants instituted the application with a view to securing the eventual removal of the respondent from her office as a commissioner on the grounds of her misconduct. The grounds set out in support of these contentions are dealt with later in this judgment. The applicants also

contended that in the light of the nature of the misconduct of the respondent, her continued participation in the planning and execution of the 2014 elections would seriously harm the credibility of the commission and, by extension, the applicants' and the public's confidence in the outcome of the elections.

[8] The applicants brought an application to this Court under rule 8 of the Rules[2] ("the Rules"), for relief.[3]

[9] The first step in a process for the removal of a commissioner from office would be for this Court to determine whether, in its view, such a commissioner is guilty of misconduct and any of the contemplated action by a committee of the National Assembly is dependent upon a recommendation of this Court in respect of any misconduct of that commissioner. Counsel agreed that such a determination is indeed a requirement.[4] This is so by virtue of the provisions of section 7(3)(a) of the Electoral Commission Act, which is congruent with section 194 of the Constitution[5] and provides that:

> "A commissioner may only be removed from the office by the President –
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> (i) on the grounds of misconduct, incapacity or incompetence;
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> (ii) after a finding to that effect by a committee of the National Assembly *upon the recommendation of the Electoral Court*." (Emphasis added.)

[10] The determination by this Court constitutes an opinion upon which it bases its recommendation.[6] It is the prerogative of the committee of the National Assembly to make findings of misconduct. However, this Court is required to weigh up all the relevant factors and decide the question of misconduct in order to make a recommendation. In *Ex parte Porritt*,[7] Squires J said as follows:

"Applied to the context of that subsection, it seems to me to mean that the Master must, in the first instance, himself weigh up all that can be said for and against an application for rehabilitation and decide whether, in his estimation, the applicant is worthy of rehabilitation; and whether removal of the diminished status of insolvency in the particular case is desirable. For a variety of reasons related to his supervision of events in a sequestration and to his closer contact with the insolvent, creditors and trustees, he is normally in a better position than anyone else to identify and assess the merits of such an insolvency, shorn of any wider legal considerations. As was said by Slomowitz AJ in *Kruger v The Master and Another NO*, *Ex parte Kruger*

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1982 (1) SA 754 (W) at 757G, albeit in discussing a larger issue, '. . . what was intended (by s 124(2)) was an independent exercise by the Master of a discretion.'"

In *Walele v City of Cape Town and others*,8 O'Regan ADCJ said as follows:

"In making recommendations to a municipality on an application for the approval of building plans, a Building Control Officer must consider two primary issues. He or she must have regard to all the requirements in the Building Standards Act and other applicable legislation which might have a bearing on whether or not the plans should be approved. Section 7(1)(a) makes plain that if the plans do not comply with the Act or other applicable legislation, the municipality may not approve them. Similarly, the Building Control Officer must pay regard to the requirements set out in s 7(1)(b) of the Act and consider whether the proposed building will probably or in fact: disfigure the area; be unsightly or objectionable; derogate from the value of adjoining or neighbouring properties; or be dangerous to life or property. All of these matters must be considered by the Building Control Officer. The Building Control Officer may not recommend the approval of the plans if he or she is not satisfied that the proposed building does comply with the Act and all applicable legislation, or if he or she thinks that the proposed building will have or probably have any of the harmful effects mentioned in s 7(1)(b)." (Footnote omitted.)

[11] Section 20(7) of the Electoral Commission Act grants this Court jurisdiction to investigate any allegation of misconduct of a member of the Commission. It became common cause that the issue to be investigated is whether the respondent is guilty of misconduct. In order to then make a recommendation, the court is of the view that such can only be made based on the facts found by us to have been proven after weighing up and considering all relevant factors.

[12] Following on the argument on behalf of the applicants, Counsel for the respondent concentrated on the urgency of the matter. It was submitted that the respondent had had little time to prepare her affidavit; that she was extremely busy due to the upcoming elections and did not have time to properly attend to placing her version or explanation before this Court; that the removal of the respondent from the Commission would result in only four commissioners being in office, which in turn could result in a stalemate during meetings where a majority vote amongst the five commissioners secures a decision of the Commission; that she was not brought to this Court to contend with an investigation as envisaged in section 20(7) of the Electoral Commission Act; and that, due to the fact that in the past she was not called upon to answer allegations of misconduct, her explanation, already given to the National Assembly, needed supplementation.

[13] Counsel for the respondent was invited to deal with the merits of the matter and to indicate the nature of the additional evidence which the respondent wished to tender. It was not contended that the respondent wished to give explanations different than those already on record, but

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only that she wished to furnish additional information. It is difficult to think of any reason why her responses to the allegations would be any different simply because it would be elaborated upon and were given for a different purpose.9

[14] In dealing with the merits of the matter it was accepted that the respondent had already set out her responses to the complaints against her in a document which had been submitted to the National Assembly. Her Counsel said that the respondent might wish to place further explanations before the court. Although it became apparent that the additional matter which the respondent wished to place before the court was limited to three or four issues, it seemed prudent to allow her a further opportunity to formulate additional explanations.

[15] The second ground, namely that the respondent was extremely busy at the time, was understandable but not a reason to postpone the matter for fifteen to twenty days as suggested by her Counsel. The matter before this Court is of importance. The court was, therefore, of the view that the respondent should give priority to it. There was no indication that the Commission would not be able to function properly and smoothly should the respondent apply her mind to the few issues indicated by her Counsel that needed elaboration.

[16] The submission that the Commission may have found itself in a stalemate position if only four commissioners remained in office is speculative and can therefore not outweigh the importance of the matter before this Court. It was also contradicted by credible, uncontroverted evidence: at a meeting where the applicants sought to discuss the possible stepping down of the respondent from her office, the remaining commissioners gave the assurance that they and the Commission would not be hampered in the performance of its functions, should the respondent not be present or available during the forthcoming elections. This issue was, accordingly, not a bar to the continuation of these proceedings.

[17] The argument, on behalf of the respondent, that she was not brought to court to contend with the investigation envisaged in section 20(7) of the Electoral Commission Act, but only to object to the relief sought in the notice of motion, needs to be placed in its proper context. Regrettably, the manner in which the relief was originally framed in the notice of motion,

together with the applicants' insistence that an investigation by this Court could be dispensed with, unduly obscured the appreciation of the core question, ie the investigation that this Court is enjoined to conduct into the allegations of misconduct of the respondent. This is so despite the affidavit filed by the applicants detailing the relevant sections of the applicable legislation and concluding as follows:

"To this end, s 20(7) of the Act accords this honourable court jurisdiction to:

> '. . . investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in s 7(3)(a)(ii).'".

[18] The respondent's Counsel argued that the court's directive, issued in terms of rule 8(3), that the parties may file affidavits and submissions by 4pm on Friday 25 April 2014, was not a clear indication that an investigation would be held. By having regard to the relevant legislation and Rules as well as the contents of the applicants' affidavit, our view was, and remains, that an investigation was indeed indicated. Nevertheless, in the interests of fairness, a further directive was issued which allowed the respondent more time to address the issues which she wished to elaborate upon.

[19] Once that directive clarified any uncertainty that may have existed as to the status of the matter before this Court, the position changed. Despite the wording of the notice of motion, the matter is what it should have been from the outset, namely, an investigation as envisaged in the Electoral Commission Act. A notice of motion, as a procedural step in litigation, accordingly has no relevance. The requirements for the commencement of such an investigation are set out in rule 8(1):

"Investigation of misconduct, incapacity or incompetence of a member of the Commission.

1. An allegation of misconduct, incapacity or incompetence on the part of a member of the Commission must be –

   (a) in writing and, if possible, accompanied by supporting evidence; and

   (b) lodged with the Secretary."

[20] There was no dispute that this point had indeed been reached. Counsel for the respondent agreed that the lodging of the founding affidavit by the applicants was sufficient to constitute compliance with rule 8(1).

[21] I disagree that an investigation by this Court can be dispensed with and, despite the heads of argument to the contrary, Counsel for the applicant conceded that this is so. In the circumstances, the following directive was issued:

"This court directs that an enquiry as envisaged in s 20(7) of the Electoral Commission Act will be held on Friday 2 May 2014 at 10h00. The first respondent is given the opportunity to file a further affidavit in order to clarify any of her responses to the Public Protectors' report styled

'Inappropriate Moves'10 and to the allegations contained in paragraph 30 of the applicants' affidavit."

[22] This directive was issued by virtue of the very limited issues which Counsel for the respondent submitted needed further clarification. Indeed, a period of two days to deal with the three or four matters raised by Counsel was, in our view, quite generous. In affording the respondent the opportunity to further respond in writing to the allegations it was anticipated that, due to the limited disputes, the investigation would be dealt with on the papers. This is so by virtue of the fact that the nature of the investigation is determined by the nature of the issues to be dealt with. Counsel for the applicants submitted that:

"An investigation . . . connotes the conferral of powers on the court to carry out its constitutional purpose, such that a court is not simply to resolve a dispute between litigating parties. If the court has sufficient evidence before it to make a recommendation, it has no need to invoke investigative competences. That the court has a discretion to determine whether a full scale investigation is required is evident from the language of s 20(7) of the Act which states that the court "may investigate any allegations. . . . "

Save for the issue of dispensing with the investigation, I agree with Counsel's submission. The scope of the requirements of any investigation by this Court is defined by, and will depend on, the facts of each case.

[23] A further issue raised by the respondent at the initial hearing was that the failure to join the National Assembly in the application rendered it defective. It was argued that, since the respondent's removal from office could not take place before the upcoming 2014 elections, the matter should be dismissed. The answers thereto are three-fold. Firstly, this Court is obliged to perform its functions regardless of what the National Assembly may do thereafter. Secondly, with the proceedings taking the form of an investigation, no joinder of any party is essential or required. It is an investigation by this Court into the conduct of the respondent. It does not matter whether the information is contained in affidavits, either founding or replying, or in reports. The information is before this Court in its investigative capacity and should be considered along with all relevant facts. Strictly speaking, there is no longer an applicant or a respondent. However, for the sake of convenience, I continue to refer to the parties as indicated at the outset of the judgment. Thirdly, there is no room for a dismissal of the relief sought where the proceedings are by their very nature an investigation, save in circumstances where the allegations may be frivolous or for another reason untenable or unsubstantiated and no investigation is called for.11

[24] It was also submitted that the respondent is currently engaged in legal proceedings with a view to have the Public Protector's findings reviewed and set aside. However, such a review can have no bearing on the

question which this Court has to investigate. In addition, the respondent's responses to the relevant allegations have been placed before the court.

[25] The respondent's Counsel argued that this matter is one of self-created urgency and that the applicants should be denied a hearing on that basis. Although rule 8 does not prescribe strict time limits such as those contained in rules 5 and 6, rule 2 refers to the "need for the expeditious disposal of matters" by this Court. This Court is aware of that duty. The question of urgency is consequently not a tool which can be used to bar the court from investigating the matter on an urgent or expeditious basis.

[26] In addition, one of the recommendations of the Public Protector[12] was that the Commission, in consultation with the National Treasury, consider commissioning a forensic investigation into the lease agreement and related expenditure which form the basis of the complaint of misconduct in this matter, in order to determine a fair market value and to recover any extravagant expenditure incurred. A forensic report[13] ("the PwC report") was completed on 14 December 2013, and it was only published on 18 March 2014. It cannot be disputed that such a forensic report would have either confirmed the Public Protector's findings or vindicated the respondent. As it turned out, it confirmed the Public Protector's findings and made other serious findings against the respondent.

[27] Taking this into account, as well as the steps which the applicants took in order to engage the respondent in an attempt to resolve the applicants' disquiet, I am of the view that those steps, together with this Court's general approach to dispose of matters expeditiously,[14] render the matter sufficiently urgent to justify the conducting of an investigation forthwith. The approach of this Court is that it is, by its very nature and design, enabled to deal with matters on an urgent basis. It adjudicates disputes regarding electoral matters as they arise. Consequently, through its directives issued to the parties, the court determined to resolve this matter as expeditiously as possible, given the reality and urgency of the situation with the elections only a few days away. The expeditious finalisation of the matter would be in the interest of the respondent, as the completion of an investigation would lead to a position where certainty could prevail.

[28] The respondent filed an affidavit in compliance with the directive given by this Court which gave rise to disputes that required further investigation. Having due regard thereto, this Court formed an initial view that the investigation was unlikely to be completed prior to 7 May 2014 and that a decision regarding any possible recommendation, if justified, could not be reached by the time that the elections were held. This was due to the fact that there were only two working days left before the elections were to be held. Even if we had made ourselves available on the Saturday and Sunday in order to have four days available to conduct the

investigation, there were logistical and time constraints that would have prevented deliberation and the reaching of a conclusion. A hasty decision, based on some disputed facts, would not have been in any party's interests.

[29] On the resumption of the hearing on 2 May 2014, the respondent's Counsel complained that she had had insufficient time to place her version before the court. At the commencement of the investigation we enquired from her Counsel whether there would be an application for further time to be granted for the filing of an affidavit. The enquiry was answered in the negative. However, Counsel indicated that he might require more time to present his argument. Although the volume of the matter contained in the affidavit filed by the respondent was in contrast to what Counsel indicated might be the position during the initial hearing, the court was still alert to the fact that Counsel indicated an unease because of a possible lack of time to argue his client's case properly. As this Court is enjoined to act fairly, we considered the following position. Jafta AJP (as he then was) said in *Bongoza v Minister of Correctional Services and others*:[15]

> "Those decisions dealt with the requirement for a tribunal to adopt and follow a fair procedure. Their focus was upon the need to act fairly where the rights of other people could be affected by an administrative decision. The procedural fairness referred to in those authorities is by no means confined to the standard of fairness usually found in a court of law. It is a requirement to act fairly whether it be by an administrative tribunal or a court of law. Thus in *Du Preez*,[16] Corbett CJ said at 233C–F:
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> > 'I am of the view that likewise in the present case the Commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings. As I have indicated the subject-matter of injuries conducted by the Committee is "gross violations of human rights". Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct. The Committee is charged with the duty of establishing, *inter alia*, whether such violations took place and the identity of persons involved therein. The Committee's findings in this regard and its report to the Commission may accuse or condemn persons in the position of appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly.
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> > But what does fairness demand in the circumstances of the present case? That is the critical question. Section 30(2) requires that persons detrimentally implicated should be afforded the opportunity subsequently to submit representations to or give evidence before the Commission. But does that exhaust the requirements of fairness? The appellants say "No; we require, in the first place, reasonable and

> > timeous notice of the time and place when evidence affecting us detrimentally or prejudicially will be presented to the Committee." King J was of the view that fairness required such notice to be given. I agree.'".

[30] I align myself with the views expressed above. Accordingly, the respondent was afforded sufficient

opportunity to fully present her case before the court. Although the order that was made had defeated the immediate objective of the applicants, it was nevertheless, in my view, the appropriate order having regard to all the facts and circumstances.

[31] The investigation was accordingly postponed to the week of 2 June 2014 on the following terms:

"(a) The respondent is afforded the opportunity of placing any further evidential material before the Court, as she may be advised to do, by 19 May 2014.

(b) Should the applicant wish to supply further evidential material it may be done by 23 May 2014.

(c) Both parties are requested to submit heads of argument by 28 May 2014."

[32] During the week preceding the proposed continuation of the investigation, the parties met with the presiding judge where it was further agreed that the investigation would proceed on 4 June 2014 and not on 2 June 2014. All the parties accepted that the investigation was to be conducted with reference to the documents before the court and that no additional evidence was required, save that the respondent was requested to furnish particulars regarding the past disclosure of her relationship with Mr Mufamadi, as referred to by her in her affidavit.

[33] I have shown that the triggering event for this Court to exercise its powers of investigation occurred when the applicants lodged allegations of misconduct on the part of the respondent with the Secretary of this Court.17 The respondent was given the opportunity to respond to the allegations by 5pm on 1 May 2014 in order to elaborate upon the responses already on record. As a result, the investigation as envisaged in section 20(7) of the Electoral Commission Act was to commence on Friday 2 May 2014 at 10am.

[34] The applicants' Counsel initially submitted that the facts relied upon by the applicants were sufficient for this judicial investigation to find and conclude that the respondent is guilty of serious misconduct. However, the seriousness, or otherwise, of any misconduct is not an element referred to in section 7 of the Electoral Commission Act. The question which arises in this investigation is whether the respondent's actions of which the applicant complained, constitute misconduct.18 In addition, Counsel for the applicants submitted that by virtue of the provisions of section 9(2)(c) of the Electoral Commission Act19 the respondent harmed

the credibility, impartiality, independence and integrity of the Commission. I am of the view that the court is mandated to investigate whether the relevant conduct falls within the meaning of misconduct as envisaged in section 7(3)(a)(i) of the Electoral Commission Act. It was submitted by the applicants that a contravention of section 9(2)(c) of the Electoral Commission Act by a commissioner does constitute such misconduct. The respondent submitted that only in the event of a contravention of section 9, can misconduct be found on the part of a commissioner. I disagree. The provisions of section 9 form the basis of a code of conduct for commissioners, but they are not an all-inclusive set of rules determining misconduct. Section 7 does not limit misconduct to that which is contained in section 9.

[35] Principally, the applicants rely on the findings of the Public Protector, which is also a State institution supporting constitutional democracy as provided for in Chapter 9 of the Constitution. The respondent's Counsel submitted that the Public Protector had not conducted a judicial investigation, had not enquired into and did not make findings on whether the respondent was guilty of misconduct warranting her removal as a commissioner. Firstly, the fact that the Public Protector's report does not conclude that the respondent is guilty of misconduct is of no consequence. For present purposes, it is the Electoral Court that is empowered to investigate the facts and then to make a value judgment as to whether the facts do indeed constitute misconduct, in order to make any recommendation. Any opinion expressed or finding made by the Public Protector in this regard is not binding on this Court. Secondly, I am of the view that the contents of the Public Protector's Report are sufficiently and materially relevant in order for this Court to have regard to it. The Constitutional Court, in *Kaunda and others v President of the Republic of South Africa and others*,20 sanctioned the use of reports by Amnesty International and The International Bar Association as a materially relevant consideration in deciding a claim for diplomatic protection pressed by the applicants who faced rights violations abroad. Chaskalson CJ expressed the proper position as follows:

"Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case."21

[36] The view was subsequently adopted by Murphy J in *Tantoush v Refugee Appeal Board and others*,22 where the Court held that:

". . . it is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological

character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights."

[37] I agree with the applicants' submission that the above approach extends to a report of the Public Protector, whose office is a Chapter 9 institution tasked with the constitutional duty to investigate conduct in state affairs or in the public administration in any sphere of government that is alleged to be improper, or which may result in impropriety or prejudice.23

[38] This is even more so since the respondent has attached her response, provided to the National Assembly, regarding the relevant allegations contained in the Public Protector's report, to the affidavit that she filed in this Court. In this response, as in the additional affidavit filed on 2 May 2014, she has dealt with the allegations against her. The result is that the question which is to be answered will, largely, be premised on the respondent's own version.

[39] It was further submitted that the conduct, which this Court is called upon to investigate, is not the conduct of the respondent in her capacity as a commissioner, and that an investigation can only be held to establish whether the respondent, *qua* commissioner, is guilty of misconduct. The argument was as follows: "The conduct of a person, at any time before her or his appointment as a commissioner, is not the conduct of a commissioner." The argument is premised on the provisions of section 9 of the Electoral Commission Act. I am of the view that section 9 is but one source of possible misconduct. Therefore, the limitation of the investigation to whether the respondent contravened the provisions of section 9 only has no justification. Although the investigation into any misconduct is in terms of the provisions of section 7 of the Electoral Commission Act, it is necessary to read that section in conjunction with section 9 of the Act, which section prohibits any commissioner from placing:

"in jeopardy his or her perceived independence or in any other manner harm the credibility, impartiality, independence or integrity of the Commission." (Emphasis added.)

[40] The conduct of the respondent, which may prove to be misconduct on her part, whether during the time after her appointment as a commissioner or before, would constitute conduct which may harm the Commission. The underlined words, in my view, are wide in their reach and would include conduct prior to the respondent's appointment as a commissioner. What is important is the possible effect of the respondent's conduct on the independence, credibility and integrity of the Commission. It would, in our view, be artificial to say that misconduct which came to light after the appointment of a commissioner, which may have impacted on her very appointment – had it been known, and which could have disqualified her from office, cannot be investigated by this Court. However, in my view, if the conduct had an impact upon the credibility, independence or integrity of the Commission, this court is obliged to investigate it. The provisions of section 9 of the Electoral Commission Act require commissioners to

act according to the prescripts of the Act. A failure to do so, would, in my view, constitute misconduct, irrespective of the time when such misconduct was committed.

[41] If I am wrong in this conclusion, reference only needs to be made to section 7(3)(a)(i) of the Electoral Commission Act, which provides that a:

"commissioner may . . . be removed from office by the President . . . on the grounds of misconduct . . . . "

Counsel for the applicants submitted that the conduct referred to is not time bound. I am of the view that Counsel's argument is sound. The wording of the section is clear and the limitation contended for by the respondent cannot be read into section 7. As Meyer AJA said in *Harmony Gold Mining Company Ltd v Regional Director*, *Free State Department of Water Affairs and others*:24

"The limitation contended for by Harmony is not expressly provided for in ss (3) and will thus have to be read into it by implication. Corbett JA in *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A), said that '(w)ords cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands'."25

[42] Wallis JA explained the test for statutory interpretation as follows:26

"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services* (*Pty*) *Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in

regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (Footnotes omitted.)

[43] The wording of the legislation is clear. It has not been shown that the context of section 7 requires it to be read in any manner other than excluding a time period. If regard is had to the provisions of section 9, there are subsections where the legislation wished to refer to a period "during the term of office" and others where it specifically excluded those words. In our view, the purpose of the section is to promote high standards of commissioners and to avoid those who are unfit for office to hold office. The result is that the person who

occupies the office of commissioner must be free from conduct which can taint that high office, irrespective of when the misconduct occurred.

[44] Section 7(3) does not reference section 9 as a basis for any misconduct. There is also, in our view, no justification to read into the subsections of section 9 the words "during his or her term of office" where it does not appear. The Legislature used such words in those subsections where it deemed it appropriate to limit the reach of the subsections. Section 9(2)(c) is not couched in terms that limit the reach of subsections as is the position with section 9(2)(a) and 9(2)(f). The omission of the limitation in section 9(2)(c) and the wording therein "or in any other manner . . ." render the provisions of section 9(2)(c) much wider to include conduct of the commissioner prior to or after serving as a commissioner.

[45] The question that arose was whether the facts relied upon by the applicants, that underlie the investigation and which are based on the respondent's admission that she violated procurement procedures, as also confirmed by the reports of the Public Protector and Treasury, constitute misconduct by the respondent. Her conduct, while she was the Chief Electoral Officer ("CEO") and accounting officer of the Commission, came under scrutiny. The facts relied upon are set out below. Both parties submitted that the ". . . crisp issue in this matter is whether that conduct, as a matter of law, amounted to misconduct warranting . . . the respondent's . . . removal from office." This, in my view, is the obligation imposed upon this Court.27

[46] On 26 August 2013, the Public Protector released a final report on her investigation into allegations of maladministration and corruption in the procurement of Riverside Office Park premises for the head office of the Commission. The Public Protector found, *inter alia*, that the respondent, as CEO of the Commission and prior to her appointment as a commissioner, had presided over a grossly irregular process for procurement of the Commission's premises in 2009, which process was also characterised by violations of procurement legislation and prescripts. The respondent did so, it was found, despite her having had an

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undisclosed and unmanaged conflict of interest as she had a close business relationship with Mr Thaba Mufamadi, a significant stakeholder and the successful bidder in the procurement process. The Public Protector's report further found that the respondent's improper conduct and maladministration risked impairing public confidence in the integrity and impartiality of the Commission.28

[47] The first ground of complaint (the maladministration complaint), is premised on several factual findings of the Public Protector. These are:

[47.1] the respondent contravened the Commission's original tender award and, before it was rescinded, invited potential bidders to submit proposals in a new procurement process, without authorisation by the Commission to do so, which was improper and constituted maladministration;

[47.2] the process followed by the respondent in the procurement of the Riverside Office Park building was grossly irregular as it was characterised by violations of procurement legislation and prescripts.

[48] This complaint is, additionally, based on the PwC report, which found the following pertinent matters:

- the procurement process followed by the respondent was not fair, equitable, transparent, competitive or cost-effective as required by section 217(1) of the Constitution, and some of the expenditure could have been avoided had reasonable care been taken;29
- the process involved numerous errors, which resulted in Abland being favoured at the expense of other bidders, as well as at the expense of the Commission;30
- as a result of the irregularities, the Commission is being overcharged by Abland in an amount between R20,8 million and R110 million over the ten year term of the lease;31 and

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- the respondent, as CEO and accounting officer, should be held responsible for the role she played in the irregular process.32

[49] The second ground of complaint (the conflict of interest complaint) is premised on the following findings of the Public Protector:

- the respondent had an undisclosed and unmanaged conflict of interest which compromised her duty to act in the best interests of the Commission, as she had a close business relationship with Mr Mufamadi, who was;33
- the chairperson of Manaka Property Investments (Pty) Ltd, which held a 20% stake in Abland (Pty) Ltd ("Abland"), the company which was eventually awarded the tender, and was a co-director with the respondent and also executive chairperson of Lehotsa Investment (Pty) Ltd ("Lehotsa");34 and
- on at least one occasion, introduced by the respondent to colleagues at the Commission as her business partner.35

[50] Despite this conflict of interest, the respondent was closely involved in the initiation of the procurement process, as well as the evaluation and adjudication of the bids for the procurement of the building in her capacity as the CEO and chairperson of the executive committee of the Commission ("EXCO").

[51] It was said that the respondent's improper conduct and maladministration, in particular the non-compliance with relevant procurement prescripts, as well as her undisclosed and unmanaged conflict of interest, had the impact of risking loss of public confidence in the Commission as an organ of state in open and transparent procurement of goods and services, risking impairment of the integrity and reputation of the Commission as

an impartial constitutional body with optimal levels of integrity and fostering a perception among potential service providers that they cannot expect fair and equal treatment from the Commission.36

[52] Although the court has to distinguish between facts found and conclusions reached by the Public Protector and the PwC report, the respondent has been afforded a full opportunity to furnish answers to the allegations, whether matters of fact or findings and conclusions by the Public Protector and those contained in the PwC report. Both the reports are comprehensive. The court will only deal with the matters contained in the reports upon which the complaints are based.37

[53] A number of issues canvassed in the Public Protector's report are confirmed in the PwC report. Three instances are set out. Firstly, the Public Protector's report found that the needs-analysis conducted was not comprehensive enough to include fixtures and other items subsequently

procured as part of a turnkey solution. This resulted in poor demand management and left a blank cheque to be filled in during negotiations with Abland as a sole supplier. This report also found that the turnkey solution had not been approved by the Commission when Abland was appointed and that the items were not procured through an open market process. The PwC report confirms that Abland was used as an agent to procure furnishing from third parties for just under R60 million. This was not part of the original request for proposals. Thus the amount of almost R60 million had not been properly budgeted for as the funds were initially procured from a roll-over of funds of the previous year. As a result the budget steadily increased as the Commission simply purchased what it wanted.

[54] Secondly, the Public Protector's report states that no formal bid specification committee was used to draft a needs-analysis that would have catered for all the needs of the Commission. The PwC report finds that the space requirements of the Commission were not properly calculated and that the space norms of the Department of Public Works were not properly applied. Had these norms been applied, the space to be rented would have been 6500 square metres rather than the 9000 square metres which the Commission had advertised was required. A company called Spacejam was tasked by the Commission in July 2009 to do a needs-analysis. They assessed the Commission's needs at 8550 square metres. When this company was brought in to do the analysis it was too late because the tender had already been awarded. The final space procured from Abland was 9489 square metres, which is even more excessive. According to the PwC report, the cost of the excess space on the assumption that the correct size was 6500 square metres will be a sum of R110 million over a ten-year period. Furthermore, on the assumption that the space needs were correct, the effect of rentalising various fixtures over the ten-year lease period at high operating costs was that the Commission incurred additional expenditure in the sum of R20.8 million above expected market norms over a ten-year period.

[55] Thirdly, the Public Protector's report found that the change in occupation date of the property from April 2010 to August 2010 was irregular because bidders who proposed a later date were not considered. The PwC report indicates that the EXCO, chaired by the respondent, did not perform its function as a bid evaluation committee properly. It relied almost exclusively on the summary spreadsheet prepared by Mr Langtry, the respondent's then office manager. The spreadsheet indicated that certain bidders should be excluded because they failed to meet the Commission's requirements as advertised. The spreadsheet contained a number of material errors. One of the bidders that were disqualified, Khwela City ("Khwela"), was excluded on the basis that it had offered an occupation date of June 2010 whereas the Commission had requested a date of 1 April 2010. It has been established that EXCO subsequently permitted Abland to change the proposed occupation date to 1 August 2010. This was irregular in the light of the fact that other bidders had been excluded by virtue of the initial occupation date as specified by the

Commission. According to the PwC report, had Khwela not been excluded, it would have scored higher than Abland on the PPPFA38 criteria. It should therefore have been awarded the contract.

[56] Save for the aforesaid matters, this Court directed that the respondent should furnish answers to the allegations which are contained in paragraph 30 of the applicants' affidavit. Those allegations include the matters referred to previously in this judgment and, in addition, conclude that:

"the procurement process followed by Adv. Tlakula was not fair, equitable, transparent, competitive or cost-effective as required by section 217(1) of the Constitution, and some of the expenditure could have been avoided had reasonable care been taken;"

and:

"Adv. Tlakula, as CEO and accounting officer, should be held responsible for the role she played in this irregular process."

[57] By virtue of the fact that there was no longer any urgent reason to finalise the matter, the limitation39 placed on the issues which the respondent was called upon to deal with, fell away. Accordingly, prior to the continuation of the proceedings envisaged for 2 June 2014, this Court issued the following directive:

"The Electoral Court's directive issued on 29 April 2014 requiring the respondent to contain her responses, as far as the PWC report is concerned, to the allegations contained in paragraph 30 of the applicants' affidavit, is no longer applicable. The respondent is required to deal with all matters contained in the PWC report, relevant to her conduct."

In this manner, the respondent was afforded an opportunity to deal with any adverse findings contained in the PwC report.

[58] Despite the court having indicated to Counsel for the respondent that directives regarding time for the filing of documents are interlocutory by their very nature and that if time was needed on a well-grounded basis in order to submit responses, it would be granted to the parties, the respondent's reaction was not to deal with the further allegations contained in the PwC report. The respondent rather elected to respond to the aforesaid directive through her attorney, who, in an affidavit, responded as follows:

> "5. We submit that this Court has misdirected itself in issuing the new directive. The complaint upon which the applicants rely is fully set out in the founding affidavit deposed to by Mr Holomisa. The complaint was further amplified through the submissions made by the applicants' counsel when the matter was heard on 2 May 2014. Furthermore, in its directive of 29 May 2014, this Court, in clarifying the applicants' complaint, directed the first respondent, in relation to the PWC report, to confine herself to the allegations contained in paragraph 30 of the founding affidavit.
>
> 6. Accordingly, without hearing any further submissions, this Court has decided *mero motu* to expand the scope of the complaint beyond that

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> which is contended for by the applicants. We submit that this Court is not empowered to do so.
>
> 7. In addition, the new directive afforded the first respondent only one court day to traverse and respond to the PWC report. In terms of the order of this Court on 2 May 2014, the first respondent is required to file the additional evidence she wishes to place before the Court by 19 May 2014. This affidavit will be filed with the additional evidence tendered in accordance with the directive of 29 April 2014 and the order of 2 May 2014. The PWC report runs in excess of 200 pages, excluding annexures. Thus in the limited time available, it was virtually impossible for the first respondent and her legal representatives to respond to the PWC report in its entirety. Moreover, the matter is not urgent. In addition to being not competent, we submit that the new directive is in any event grossly unreasonable."

[59] The statements are clearly misconceived in, at least, two respects. If the respondent needed time to react to allegations, she could have requested further time and her request would have been considered by the court, as it did in all other previous instances.

[60] The second, but more serious, flaw as echoed in the argument presented on behalf of the respondent, is the statement that the court had expanded the scope of the complaint beyond that which is contended for by the applicants. The deponent appears to ignore the fact that there are a number of documents before this Court containing allegations regarding the conduct of the respondent. These include founding and replying affidavits of the applicants, the report of the Public Protector as well as the PwC report. A cursory glance at section 20(7) of the Electoral Commission Act enlightens the reader that the court, once it has embarked on an investigation, may look at any allegation of misconduct. The allegations that are contained in the three sources referred to above are now before the court and the respondent was requested to deal with them, irrespective of their source. To confine the court's investigation to that, which has been articulated in the founding affidavit of the applicants, would place a wholly unwarranted limit on the duties of the court. Far from being a misdirected or irregular or unreasonable as contended by the respondent's attorney, the court afforded the respondent the opportunity to deal fully with that which is before this Court specifically, to be reasonable and fair. As a responsible official, the respondent should deal with what is before the court so that the investigation may be adequately conducted. The belief that the scope of the investigation is to be limited to the contents of the applicants' affidavit, is without substance and clearly wrong. It is also contradicted by the respondent's attorney in his own affidavit. He was alert to the fact that the complaint was ". . . fully set out in the founding affidavit deposed to by Mr Holomisa and was further amplified through the submissions made by the applicant's counsel . . . . " The affidavit attested to by Mr Holomisa incorporated both the Public Protector's report and the PwC report.

[61] Despite this, and having had the opportunity to fully consider the contents of the PwC report, this Court formed the view that the directive of 2 June 2014 sufficiently required the respondent to deal with the allegations

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contained in the PwC report that may have needed a response from the respondent for purposes of this investigation. The respondent's responses after the directive of 2 June 2014 can be considered and evaluated by this Court without reference to the matters, which the respondent's attorney believes and the respondent's Counsel argued, to be an "expanded scope of the complaint."

[62] During final argument, the applicants referred to certain paragraphs in the 2010 Annual Report of the Commission, issued under the signature of the respondent. This Court ruled that references in the document, which is a public document and readily available on the Commission's website, could form part of the material before us. The respondent was, accordingly, allowed time to deal with the issues specifically referred to by the applicants.

[63] The respondent responded to the findings of the Public Protector in submissions supplied to a committee of the National Assembly ("the first response"). She also filed an affidavit in this Court on 1 May 2014 ("the second response") and furnished further evidence in affidavits filed on 19 May 2014 in accordance with this court's directive ("the third response"). An affidavit dealing with the 2010 Annual report was filed on 10 June 2014.

[64] While not contending that the procurement process over which she presided was lawful, the respondent submitted that none of those instances of non-compliance with aspects of the relevant procurement legislation constitute misconduct by a commissioner within the meaning of sections 7, 9 and 20 of the Electoral Commission Act. The respondent further contended that she was under no obligation to make further

disclosure "in the circumstances prevailing at the time." She also alleged that the conduct under investigation does not and has not as a matter of fact undermined the credibility of the Commission in the public eye. Lastly, the respondent does not seriously deny that she failed to disclose and manage her relationship with Mr Mufamadi in the context of the lease procurement process. She disputes that she had a duty to disclose it, contending that she had no such duty because she had no financial stake in the company concerned.

[65] The presence of misconduct is in our view, an objective question.40 The conduct is to be viewed against the accepted norms and standards as set out in legislation and the common law.

[66] The approach in an investigation such as the one with which this court is seized, has been dealt with by the Appellate Division (Supreme Court of Appeal) on a number of occasions.

[67] In *Olivier v Die Kaapse Balieraad*41 it was held that the proceedings are *sui generis* and civil in nature where the test is on a preponderance of probabilities. The Appellate Division said in *Nyembezi*:42

"When a law society applies for an attorney to be struck off the roll, it places before the Court facts which, in its submission, show the respondent is no

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longer a fit and proper person to continue in practice as an attorney. The respondent replies with explanations and other facts to show the contrary. The Court, after considering the facts and hearing argument, decides on a balance of probability whether the respondent's alleged offending conduct or acts have been established and, if so, whether they show that, by reason of his character or otherwise, the respondent is not a fit and proper person to practise as an attorney. Although that may sometimes necessitate making a value judgement to some extent, the Court's function is, in essence one of making an objective finding of facts, and not the exercise of a discretion."

[68] In *Freedom under Law v Acting Chairperson*, *Judicial Service Commission and others* 43 Streicher JA said:

". . . an investigation of a complaint of gross misconduct is not a criminal enquiry, but more in the nature of a disciplinary enquiry, where proof on a balance of probabilities is required at its conclusion."

[69] In *Hepple and others v Law Society of the Northern Provinces*44 Mthiyane DP said:

"In considering whether a case has been made out against an attorney sought to be struck from the roll it is necessary to bear in mind that the evidence presented by the law society is not to be treated as though one was dealing with 'a criminal case' or 'an ordinary civil case'. The proceedings in applications to strike the name of attorneys from the roll are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are *sui generis*. It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them. In this regard the remarks of Harms ADP in *Malan v The Law Society of the Northern Provinces* are apposite:

> 'If one turns to the bookkeeping charges, the position is simply that there is no allegation of a realisation of the seriousness of the offences. They are brushed off on the basis that the society failed to prove a trust shortage that the bookkeeper had erred, that they did not know the rules, that their auditors had erred, or simply by not dealing with the pertinent allegations. Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attacked the attorneys who had to take over the files – in short, their approach on the papers was obstructionist. . . . These factors are "aggravating" and not extenuating because they manifest character defects, a lack of integrity, a lack of judgment and a lack of insight'". (Footnotes omitted.)

[70] The applicability of the relevant legal prescripts is not in dispute. The prescripts are contained in a number of Acts of Parliament, Treasury

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documents and Regulations (including regulations issued by the Commission).

[71] Section 38 of the Public Finance Management Act ("PFMA")45 sets out the general responsibilities of accounting officers, a position which it is common cause that the respondent held. Section 38 states:

"(1) The accounting officer for a department, trading entity or constitutional institution –

(a) *must ensure* that that department, trading entity or constitutional institution has and maintains –

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) *is responsible* for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(c) *must take* effective and appropriate *steps* to –

(i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(d) *is responsible* for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

(e) *must comply* with any tax, levy, duty, pension and audit commitments as may be required by legislation;

(f) *must* settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, *must* immediately *report*, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

(h) *must take* effective and appropriate disciplinary *steps* against any official in the service of the department, trading entity or constitutional institution who –

(i) contravenes or fails to comply with a provision of this Act;

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(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(i) when transferring funds in terms of the annual Division of Revenue Act, *must ensure* that the provisions of that Act are complied with;

(j) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, *must* obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(k) *must enforce* compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(l) *must take* into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(m) *must* promptly *consult* and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(n) *must comply, and ensure* compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

(2) An accounting officer *may not* commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated."(Emphasis added.)

[72] The legislative provisions place a responsibility upon the accounting officer to ensure proper compliance with the law. The responsibility is that of the accounting officer personally.

[73] In terms of the provisions of section 39 of the PFMA:

"(1) The accounting officer for a department is responsible for ensuring that –

(a) expenditure of that department is in accordance with the vote of the department and the main divisions within the vote; and

(b) effective and appropriate steps are taken to prevent unauthorised expenditure.

(2) An accounting officer, for the purposes of subsection (1), must –

(a) take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote;

(b) report to the executive authority and the relevant treasury any impending –

(i) under collection of revenue due;

(ii) shortfalls in budgeted revenue; and

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(iii) overspending of the department's vote or a main division within the vote; and

(c) comply with any remedial measures imposed by the relevant treasury in terms of this Act to prevent overspending of the vote or a main division within the vote."

[74] In terms of section 81 of the PFMA, officials in departments and constitutional institution are guilty of financial misconduct in the following instances:

"(1) An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer wilfully or negligently –

(a) fails to comply with a requirement of section 38, 39, 40, 41 or 42; or

(b) makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure."

[75] The fiduciary role of the accounting officer is highlighted by the provision for criminal offences and penalties in section 86(1) of the PFMA which includes:

"an accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with the provision of section 38, 39 or 40."

[76] In addition, the Regulations on the Conditions of Service, Remuneration, Allowances and other Benefits of the Chief Electoral Officer and other Administration Staff[46] stipulate in section 19 that:

"where a possible conflict of interest arises or where an employee has an interest, whether financially *or otherwise*, or obtains an interest in a company or firm with which the employer enters into business transactions, or where the interest is of such a nature that it may influence the outcome of any decision or benefit any person or company or firm, such interest must be disclosed in writing to the employer as soon as it arises and the employee must refrain from participation in any way in related business dealings." (Emphasis added.)

[77] The National Treasury Practice Note number 4 of 2003 is applicable to all officials and other role players involved in supply chain management. The PwC report[47] summarises these principles, correctly in our view, as follows:

"(1) The Government of South Africa commits itself to a policy of fair dealing and integrity in the conducting of its business. The position of a SCM practitioner is, therefore, a position of trust, implying a duty to act in the public interest. Practitioners should not perform their duties to unlawfully gain any form of compensation, payment or gratuities from any person, or supplier/contractor for themselves, their family or their friends.

(2) Practitioners should ensure that they perform their duties efficiently, effectively and with integrity, in accordance with the relevant legislation and regulations including the Public Service Regulations

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issued by the Department of Public Service and Administration, National Treasury Regulations and Practice Notes and directives issued by accounting officers/authorities. They should ensure that public resources are administered responsibly.

(3) Practitioners should be fair and impartial in the performance of their functions. They should at no time afford any undue of preferential treatment to any group or individual or unfairly discriminate against any group or individual. They should not abuse the power and authority invested in them.

(4) SCM practitioners 'should declare any business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest.'

(5) 'They should not place themselves under any financial or other obligation to outside individuals or organizations that might seek to influence them in the performance of their official duties.'

(6) 'Practitioners are accountable for their decisions and actions to the public.'

(7) 'Practitioners should use public property scrupulously."

(8) 'Only accounting officers/authorities or their delegates have the authority to commit the government to any transaction for the procurement of goods and/or services.'

(9) 'All transactions conducted by a practitioner should be recorded and accounted for in an appropriate accounting system. Practitioners should not make any false or misleading entries into such a system for any reason whatsoever.'

(10) The following provisions of Paragraph 6 of the Code of Conduct regarding Bid Evaluation/Adjudication teams should be noted:

'6.1 Bid evaluation/adjudication teams should regulate supply chain management on behalf of the institution in an honest, fair, impartial, transparent, cost-effective and accountable manner in accordance with the accounting officer's/authority's directives/delegated powers.'

'6.3 Bid evaluation/adjudication teams should be familiar with and adhere to the prescribed legislation, directives and procedures in respect of supply chain management in order to perform effectively and efficiently.'

'6.5 No person should –

6.5.1 interfere with the supply chain management system on an institution; or

6.5.2 amend or tamper with any bid after its submission.'"

[78] In 2002, the Commission approved its Procurement Policy. Chapter 4[48] of the policy sets out the duties of the CEO, the Procurement Committee, the Evaluation Committee and the Procurement Department as follows:

"4.2 The Chief Electoral Officer

(a) The Chief Electoral Officer (CEO) procures goods and services for the Electoral Commission and arranges for the hiring of goods and services or the acquisition or granting of any right for or on behalf of the Electoral Commission, and disposes of moveable

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assets subject to compliance with the requirements of section 12(2)(c) of the Electoral Commission Act, section 38(a)(iii) of the Public Finance Management Act, the Treasury Regulations and the Act. In respect of goods and services in excess of R2 million, the CEO does so after consultation with the Commission.

(b) The power to enter into, amend or cancel contracts rests with the CEO.

(c) The CEO may delegate certain functions.

4.3 The Procurement Committee

4.3.1 Composition

(a) The CEO establishes the Procurement Committee by appointing five members who will serve on the committee on a permanent basis.

(b) The CEO appoints a Chairperson.

(c) A quorum shall be made up of 50% of members plus one.

(d) In the absence of a Chairperson at a meeting, the Procurement Committee shall elect an Acting Chairperson from among the members present at the meeting.

(e) The Chairperson of the Committee may co-opt a member of staff for a particular meeting.

4.3.2 Meeting Procedure

. . .

4.3.3 Introduction

(a) The Procurement Committee makes recommendations to the CEO on the procurement of goods and services for or on behalf of the Electoral Commission.

(b) The Procurement Committee makes recommendations on the hiring of goods and services for, or on behalf of the Electoral Commission.

(c) The Procurement Committee makes recommendations to the CEO on the disposal of movable Electoral Commission property.

4.4 Evaluation Committee

An Evaluation Committee shall be constituted upon the closure of each and every tender or for any quote or bid exceeding R100,000. In respect of quotations and bids less than R100,000 the Procurement Department evaluates a quote and makes recommendations to the User Department to deal with within their delegated authority.

4.4.1 Composition

(a) The Evaluation Committee shall consist of:

(i) A member of the Procurement Department;

(ii) A member of the Legal Services Department;

(iii) A maximum of two members of the User Department;

(iv) In the event of a tender exceeding ten million (R10,000,000) or on recommendation of the Procurement Committee, an external expert.

(b) The member from the Procurement Department shall serve as a Convenor of the Evaluation Committee.

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(c) In the event of an external expert, the User Department together with the Procurement Department shall submit a recommendation to the Procurement Committee with regard to the appointment of such an expert.

(d) A quorum shall be made up of at least one member from the departments mentioned above.

(e) A member of the Procurement Committee may sit as a member of the Evaluation Committee.

(f) The Composition of the Evaluation Committee shall be approved by the Chairperson of the Procurement Committee.

4.4.2 Meeting Procedure

. . .

4.4.3 Functions of the Evaluation Committee

(a) Determination of Acceptable quotes/tenders/goods for Goods and Services:

(i) At the stipulated closing time for the responses, the Procurement Department at Head Office, opens the tenders and compiles a register of quotes/tenders/bids received.

(ii) The Evaluation Committee evaluates the quotes/tenders/bids according to the specifications and submits a report to the Procurement Committee.

(iii) The Internal Audit department performs audit tests prior to final adjudication.

(iv) The Procurement Committee makes recommendations to the CEO in respect of the awarding of quotes/tenders/bids taking into account the Act and the Electoral Commissions Procurement Policy. (Refer to annexure B for the Provisions of the Act).

4.4 The Procurement Department

4.4.1 The Procurement Department is responsible for the administration of all the Electoral Commission procurement processes.

4.4.2 The Procurement Department shall maintain and update a database of suppliers of the Electoral Commission.

4.4.3 The Procurement Department provides support functions to the Procurement Committee.

4.4.4 The Procurement Department must provide all the information which the Procurement Committee and/or the CEO require in connection with the execution of their powers and functions.

4.4.5 On receipt of the report from the Evaluation Committee, the Procurement Department shall apply the Act with regard to the allocation of points.

4.4.6 The Procurement Department shall perform the due diligence enquiries together with the internal Audit Unit prior to the awarding of a contract."

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[79] The legal prescripts are to be seen through the prism of the Constitution, which provides[49] that:

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained."

[80] The applicants submitted that the respondent was responsible and, as the accounting officer, accountable for her actions. There can be no doubt that this is so. In order to evaluate the conduct of the respondent, the concept of accountability needs some clarification.

[81] Okpaluba and Osode[50] remark that:

"Furthermore, one of the nine fundamental but basic values and principles of good public administration set to govern the new South African democracy in s 195(1)(f) of the Constitution is that "public administration must be accountable".'

[82] In *Ex parte Attorney-General, Namibia*, *In re*: *The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,[51] it was said that:

'"Responsibility' is defined in the *Shorter Oxford Dictionary* as:

'1. The state or fact of being responsible. A charge, trust or duty for which one is responsible. A person or thing for which one is responsible.'

And the relevant meaning of 'responsible' given is 'answerable, accountable'."

[83] Professor John Mubangizi[52] writes as follows in an article:[53]

"5.1 Accountability in the human rights context

Accountability has various meanings. *Black's Law dictionary* defines accountability as the 'state of being responsible or answerable'. Cook cautions that accountability is a wider concept than responsibility, which simply denotes liability for a breach of the law. She argues that accountability 'requires a state to explain an apparent violation and to offer an exculpatory explanation if it can'." (Footnotes omitted.)

I am of the view that accountability in the context of the Constitution and the nature of the respondent's profile within the Commission, are factors placing her within the framework of this definition of accountability.

[84] Davis J said:[54]

"In my view, the determination of the legal convictions of the community on which the test for wrongfulness is based must take account of the spirit, purport and object of the Constitution. As Prof Mureinik wrote, the new Constitution 'must lead to a culture of justification – a culture in which every

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exercise of power is expected to be justified' ((1994) 10 SAJHR 31 at 32). This principle of justification includes the concept of accountability, namely that a public authority is accountable to the public it serves when it *acts negligently and without due care*. Accountability includes the recognition of *legal responsibility for the consequences* of such action." (Emphasis added.)

[85] Schedler[55] defines "accountability" as follows:

"In governance, accountability has expanded beyond the basic definition of 'being called to account for one's actions'. It is frequently described as an account-giving relationship between individuals, eg. 'A is accountable to B when A is obliged to inform B about A's (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct'."

[86] In the circumstances, I am of the view that the respondent, as a public official, or as her Counsel suggested, "one of South Africa's leading public servants", is not only the responsible official as indicated herein before, she is to be held accountable in the sense referred to by Schedler, in that she is obligated to inform the public about her past and future actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct. Such accountability and its consequences have nothing to do with dishonesty or wilful acts by the persons so being held accountable. Arguments on behalf of the respondent that she was not dishonest would, consequently, not avail her if she is found to have misconducted herself.

[87] The view that the respondent is accountable for the procurement process is underscored by the provisions of section 44(2)(d) of the PFMA.[56]

[88] The conduct of the respondent, as a public official, is to be evaluated against the background of the prescribed legislation and as set out by the Constitutional Court in *AllPay Consolidated Investment Holdings*

(*Pty*) *Ltd and others v Chief Executive Officer*, *South African Social Security Agency and others*:57

"... deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."58

And:

"If the process leading to a bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed."59

[89] One of the basic obligations of an individual who operates in a fiduciary capacity is to avoid conflicts of interest. This principle was discussed in *Robinson v Randfontein Estates Gold Mining Co Ltd*60 where the following was said:

"Where one man stands to another in a position of confidence involving a duty to protect the interests of the other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in *Aberdeen Railway Company v Blaikie Bros.* (1 Macqueen 474), the doctrine is to be found in the civil law (Digest 18.1 34.7), and must of necessity form part of every civilised system of jurisprudence."61

And at 178:

"A director is, of course, an agent; generally he acts in conjunction with his co-directors; but he may be duly authorised to act alone, and, like any other agent, he may without antecedent authority, place himself in such a position that a Court will not allow him to say that he did not so act. See *Benson v Heathorn* (1) Y. & C., at p 340)."62

And further:

"The test is expressed, for the most part, in terms peculiar to English law; but the principle which underlies it is not foreign to our own. For it rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests (e.g., by making a profit) at that other's expense."63

Also:

"Its acquisition for himself would, under the circumstances, be a breach of faith which the courts will not allow him to set up. That seems to me a principle deducible from such cases as those above quoted. The doctrine of the English decisions was adopted by the Transvaal courts in *African Land Company v Langerman* (1905, TS. p. 499) as being in accordance with the principles of our law; and I think we should also adopt it. Whether a fiduciary relationship is established will depend on the circumstances of each case. Where the director was at the date of the acquisition the agent of the company for such a transaction, the fiduciary relationship would of course be created. That element has generally been present in the decided cases where profits have been awarded. But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine

the relationship to agency cases. There may surely be circumstances, apart from mandate, where a duty to acquire for the company may be inferred."64

[90] In *Volvo* (*Southern Africa*) (*Pty*) *Ltd v Yssel*65 the Supreme Court of Appeal held that the assessment of whether a fiduciary obligation arises is dependent on the facts of each case:

'While certain relationships have come to be clearly recognised as encompassing fiduciary duties there is no a closed list of such relationships. As pointed out in *Randfontein Estates*, and in numerous other cases in this country and abroad, whether a particular relationship should be regarded in law as being one of trust will depend on the facts of the particular case. . . outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. . . the discretion that one party may have in relation to the affairs of another, the influence that he or she is capable of asserting, the vulnerability of one person to another, the trust and reliance that is placed in the other – receive frequent mention in judgments on the subject of whether a relationship was one of trust."66

[91] The obligation of an individual who operates in a fiduciary capacity to avoid conflicts of interest was stated by the Supreme Court of Appeal as follows in *Phillips v Fieldstone Africa* (*Pty*) *Ltd and another*:67

"The following short summary attempts to encapsulate the present level of development. The rule is a strict one which allows little room for exceptions . . . It extends not only to the actual conflicts of interest but also to those which are a real *sensible possibility*. The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice."68 (Emphasis added.)

[92] The law encompasses a conflict that arises when a person has with another a relationship of a kind that would generate a conflict. By applying the principles referred to above, the court takes into account that during her tenure as CEO of the Commission, the respondent was to head up its administration69. In this capacity, the respondent was the accounting officer of the Commission for purposes of the PFMA. She thus was responsible for its financial affairs.70 The object of the PFMA is to:

"secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which it applies."71

[93] In an answer to Parliament the respondent explained her conduct regarding the procurement process. She said that she had the discretion to deviate from the prescribed procedures. However, while that departure from the prescribed procedures is permissible, such a departure must be

justified and only to the extent necessary in relation to the urgency that may prevail at the time of the deviation. The respondent said:

"The accounting officer approved that the process to be used in the procurement of the Riverside Office Park be different to the norm, given the fact that the matter was sufficiently significant and urgent. In 2009 The Electoral Commission was in the middle of conducting the 2009 general elections and a move had to be completed as soon as possible thereafter and seamlessly not to impede on the preparations for the municipal elections soon thereafter in 2011. This required precise management at a senior level."

[94] In this regard, the Public Protector said in her report:[72]

"8.5.19.1 The PFMA and Treasury Regulations require that the default position in regard to procurement is that a competitive bid procedure be embarked upon.

8.5.19.2 The legislation, however, recognises that in certain cases it is impractical to invite competitive bids and as such it is permissible to procure goods or services by other means, provided that reasons for the deviation are recorded and approved by the accounting officer (Regulation 16A6.4).

8.5.19.3 The National Treasury issued Practice Note 8 of 2007/08 wherein, *inter alia*, urgent, emergency or sole supplier cases were further regulated. Paragraph 3.4.3 thereof provides as follows:

> 'Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.'

8.5.19.4 The SCM Guide at paragraph 4.7.5.1 notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process but must act in a manner that is in the best interest of the State.

8.5.19.5 The SCM Guide defines an 'emergency case' as –

> 'a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery.'

8.5.19.6 An 'urgent case' is defined as 'a case where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical.' This definition is, however,

subject to the qualification that 'A lack of proper planning should not be constituted as an urgent case.'

8.5.19.7 The following principles can be gleaned from this definition of urgency:

(a) The early delivery is the key requirement which would decide the success or failure of the project.

(b) The time period available for the acquisition makes it impractical or impossible to pursue a competitive bid process.

(c) The urgency was not foreseeable or the result of dilatory conduct.

8.5.19.8 For a situation to be classified as urgent all three the above requirements must be met."

[95] The respondent's view that she exercised a power conferred on her in terms of section 38 of the PFMA, is wholly unsubstantiated and without merit. The explanation does not remotely place her conduct within the boundaries of urgency required. Indeed, her answer is an alleged justification without substance. The answer, therefore, does not detract from the fact that she wilfully flaunted legal prescripts on a wholly insufficient basis. She flaunted the legal prescripts and failed to explain how a period of two years which were to elapse before any further elections were to be held, could possibly have rendered the circumstances or her decision of such an urgent nature to depart from the prescripts.

[96] In the second response, the respondent does not persist with the version that she acted lawfully. The theme is that she accepts that she acted unlawfully and her Counsel said in argument that:

"Adv Tlakula, as accounting officer, accepted full responsibility for the failure of the Commission to follow the regular procurement process."

[97] The next example of the respondent's conduct emerges from remarks by the Public Protector:[73]

"By her own admission, Adv. Tlakula issued a directive on 11 February 2009 for the procurement process to be handled by EXCO to the exclusion of the procurement committee in violation of her own Commission's Procurement Policy and Procedures. In so doing, she countermanded the decision of the Commission, which had on 12 January 2009 made a decision to award the office space tender to a different company in respect of Menlyn Corporate Park premises."

The respondent took an executive decision to bring a process to an end and decided that the EXCO over which she presides would henceforth control the bid process to the exclusion of the extant procedures. This, in our view, is irregular conduct, detrimental to the Commission and a violation of the applicable prescripts. The court is of the view that it is unlawful and constitutes misconduct on the part of the respondent.

[98] In her second response the respondent states that, being aware of the fact that the process regarding the Menlyn Corporate Park office was flawed, and, being uncomfortable with the existing practice that avoided a

procurement process, she deliberately brought the process to an end and commenced the new process. However, she had done so in exactly the same unlawful fashion. The very reason given by the respondent for ending the one process was then used in the new process. In this regard, she admits that she did not "insist on the process being a full tender process in terms of the Commission's policy". She does not explain why she did not so insist on adhering to the policy. I will deal with her subsequent affidavit regarding an error, later. Indeed her actions support the perception that she ended the one process in order to commence a new one for the benefit of her business partner. She offers the re-housing of the Commission two years later as a reason for her conduct. However, since this has been shown to be fanciful and has not been pursued by her before this court, her conduct can only be seen to have breached the prescripts and to have been unlawful.

[99] I summarise. Having deliberately embarked upon an attenuated tender process, the respondent chose not to abide by the requirements of the law. The respondent's reference to an error having been made (in hindsight) is refuted by her own evidence that she deliberately took the decision not to insist on the lawful procurement process to be followed. She chose not to abide by the law. Her actions in this regard are unlawful and as such, in our view, constitute misconduct. Save for the urgency issue, which is untenable, the respondent provides no justification for her deliberate decision to break the law.

[100] Once the respondent had taken this unjustifiable decision, a plethora of unlawful actions followed.[74] They include the failure to advertise the requirements of the Commission according to the law and a failure to implement the three tiers of bid specification, evaluation and determination.

[101] Acting in this manner, the respondent's actions prompted the Public Protector to report:

"There was no separation of roles and responsibilities between the various committees within the Commission that are tasked with administration of the procurement process ie the bid specification, bid evaluation and bid adjudication committees. Though these structures may have existed under different names, they were not used in the matter under investigation."[75]

[102] The structures are in place to separate the determination of the criteria, evaluation of bids and the making of a final selection to ensure fairness in

the bidding process. In her second response the respondent accepts that she did not follow the prescribed process. She then concludes that her failure to follow due process was due to an honest mistake. This version contradicts her first version that she had the discretion which she deliberately exercised due to an alleged urgency and it is inconsistent with her second response that she deliberately decided to attenuate the bid process because she wanted to ensure an expeditious process. She was not mistaken as to what the law required but decided not to implement the law when she exercised her discretion. The striking incredulity of the respondent's version of the making of a mistake appears to be an *ex post facto* attempt to justify that which cannot be rationally explained.[76] The respondent cannot exercise a discretion deliberately not follow the prescripts and then claim that not to have done so was simply a mistake. One of the versions cannot be true. In her parliamentary response the respondent repeatedly contended that her actions were justified due to her right to exercise the discretion to deviate from the procurement prescripts. The mistake version remains an *ex post facto* conflicting explanation why she acted in the unlawful manner. The explanation in itself does not detract from the illegality of her actions. Her flaunting of the prescripts has no justification and would, in our view, constitute misconduct on her part. I will return to this issue.

[103] Having decided to be in control of the new bid process, the respondent caused certain steps to be taken. The Public Protector says in her report:

"10.2.13 The advertisement of a 'request for proposal' for the office accommodation as opposed to a comprehensive competitive tender bidding process violated the provisions of Chapter 4 of the Commission's procurement policy and was accordingly irregular and constituted maladministration.

10.2.14 The request for proposal did not comply with provisions of the Treasury Regulations, the PFMA, the PPPFA and the Commission's own procurement policy and procedures, where applicable in respect of:

10.2.14.1 The thresholds for a tender process, which the Commission policy puts at R100 000 unless otherwise approved;

10.2.14.2 The number of days that it needed to be advertised;

10.2.14.3 The evaluation process ie the evaluation and procurement committee were not involved in the evaluation process; and

10.2.14.4 The evaluation criterion was not clearly defined at the point of advertising."[77]

After bringing the procurement process under her control, the respondent failed to specify the criteria, the most fundamental part of an objective procurement process, in an advertisement to obtain new office accommodation. This failure, which contravenes the prescripts, is explained as follows in the respondent's first response:

"Failure to include the evaluation and adjudication criteria in the advertisement also violated Section (2)(1)(e) of the PPPFA."[78]

No justifiable explanation for this deviation has been forthcoming. Again, the response that there was urgency in the matter falls to be rejected.

[104] The advertisement that the respondent caused to be published was defective in a number of other respects as well. It did not specify the requirements of the Commission correctly, it was not published in the manner prescribed and it provided a shortened period for bidders to respond. The prescribed advertisement period is 21 days. Elections two years after that time could not have justified the shortened period. Proper explanations as to why those unlawful actions occurred are absent. As a result, I am constrained to infer that the respondent intended to favour her business partner by her actions. Even if she acted unintentionally, the perception that she favoured her business partner intentionally, is unavoidable.

[105] Following her discomfort with some of the procedures that were followed in a process to procure new offices at Menlyn Corporate Park, the respondent allowed an underling (Mr Langtry) to consider the proposals alone by failing to put the necessary tear structures for consideration of the bids in place, the respondent, again, allowed the process to be flawed. The EXCO, chaired by the respondent, met and shortlisted four bidders. One of the bidders was Abland, despite the fact that their date of occupation was in conflict with the initial criteria. At that stage, Abland should have been disqualified as their bid was not within the specified criteria. As accounting officer,[79] the respondent should have guarded against such a course of conduct, but she did not.

[106] The EXCO thus effectively changed the evaluation criteria without offering the benefit of the changed criteria to other bidders who had been disqualified earlier.

[107] The PwC report finds that the EXCO, presided over by the respondent, distorted the bid process to the benefit of Abland; other bidders were excluded from the opportunity of meeting the later, changed date and thus were excluded from the initial process. This resulted in a perception of manipulation of the criteria to the advantage of Abland. This conduct is, in my view, misconduct on the part of the respondent. This is borne out by the results of the bid process. The moment the criteria changed it was

the respondent's duty to ascertain whether any of the previously excluded bidders would have qualified by virtue of the new criteria, which she failed to do.

[108] The respondent chaired the EXCO meeting where the criteria was changed, Abland was recommended to the Commission as the successful bidder and Menlyn, whose bid met the criteria before the change, was excluded. Thus a candidate that did meet the stipulated criteria was disqualified. This is a remarkable outcome for which the respondent is directly responsible. The PwC report highlights this skewed outcome of the process. The amendment of the date to 1 August 2010, makes a mockery of the respondent's version that a date was one of the key criteria of the assessment as "given the pending municipal election in 2011 a later date" than 1 April 2010 "would be problematic."[80] The respondent gave no other acceptable explanation for her actions and the perception that she caused the skewed process to be to the advantage of Abland, is unavoidable. This unfair and inconsistent conduct to the benefit of Abland and detriment of other bidders constitutes, in our view, misconduct on her part.

[109] Yet the respondent claims that, with the facts before it, the Commission had both the Abland and Menlyn bids before it on "an equal footing" and that "on objective criteria, Abland had the better bid." This, of course, ignores the fact that other bids were excluded, based on the date of 1 August 2010, whilst those bids should have been revisited. This attempted justification of the result by the respondent falls far short of what she was required to do. The Constitutional Court stressed in *AllPay* that the process must be properly followed because the adequacy of the process determines the adequacy of the result. The unlawful and inconsistent process initiated and furthered by the respondent did not result in the better bid being accepted. The better bid (Khwela) had lost out due to the respondent's unlawful actions.

[110] As a final resort, the respondent argued that, because others before her had acted unlawfully when procuring leased office space, she had made an honest mistake by relying on precedent and advice. However, having regard to her previous version given to Parliament I have shown that the honest mistake version cannot be accepted.

[111] Another ground of complaint is the acquisition of the movables for the Commission by the respondent or on her instructions, referred to as the turnkey project. The PwC report finds:[81]

"The items that make up the R59,918,380 of immovable (*sic*) were reviewed to see whether they are what one would normally expect for furnishing the premises of an Organ of State. In this regard a number of items have been identified, some of which are listed below, where it appears that little or no regard was given as to whether these items were really required:

- Brushed steel plant pots R957,000 (399 @ R2,400 each)
- Gym equipment R482,942

- Gym audio equipment R69,073
- CEO's office furnishing R898,794

(Office, boardroom, waiting area and PA's office)."

The respondent, who authorised an amount in excess of R58 million to be spent on furnishing the new offices of the Commission without the supply of such furnishing going out to tender, failed to explain this conduct when requested by Treasury to do so.

[112] In her first response the respondent said that:

"It is correct that the movable portion of the turnkey solution was not part of the capital public advertisement . . . ."

She added that the items were discussed in weekly site meetings with senior officials of the Commission.

[113] The result is that only the two final bidders were afforded the opportunity to furnish the offices on a turnkey basis. No competitive bidding was secured. The PwC report describes the conduct of the respondent as incurring luxurious expenditure. That finding, having regard to the failure of the respondent to follow procurement procedures, is fully justified and I agree with it. I also agree with the Public Protector who said:

"It is important to note that even in those instances where a situation does not warrant the use of tender procedures, it does not mean that an organ of state may do away with a competitive procurement process altogether. Organs of state are still required in order to ensure compliance with the principles of competitiveness and cost effectiveness in section 217(1) of the Constitution, to procure goods or services on the best possible terms."82

The respondent's response to this by no means constitutes a justification for her failures to comply with the prescripts. The respondent's conduct by flaunting the prescripts is manifest. Her response is that she had very little to do with the turnkey transaction and it was left to Mr Du Plessis to deal with it. But the turnkey project was contained in an addendum to the lease agreement and was signed by the respondent83 on behalf of the Commission.

[114] The respondent's involvement in signing the agreement for the turnkey project can hardly be described as a "very little direct role in the turnkey transaction". On the contrary, the CEO who signs a contract intending to bind the Commission should, in my view, have knowledge of that contract. The respondent was committing the Commission to substantial expenditure without any procurement process at all. Significantly, save for stating that she had little direct input in the turnkey project, the respondent does not explain why the unlawful process was embarked upon. As accounting officer, she cannot shift the blame to her underlings in circumstances where she personally entered into the agreement on behalf of the Commission. It is significant that the 2011 annual report of

the Commission, again issued under the hand of the respondent, recorded that:

"This amount (being the amount expended in the current financial year) which includes the once off turnkey costs is disclosed as irregular due to the fact that technical issues in respect of compliance arose. These include failure to indicate the manner for evaluating the proposals in the advertisement."

This statement, put out to the world by the respondent, wholly underplays her unlawful actions. To describe the failures as "technical issues" is, in my view, a suppression of the truth.

[115] The respondent attempts to refute the finding of the PwC report that the Commission was overcharged and that expenditure incurred could have been avoided as follows:

"I understand the complaint against me further to be that my decisions were to the detriment of the Commission because it was overcharged and expenditure was incurred that could have been avoided had a regular procurement process been followed. I deny this. None of the expenditure incurred in the furnishing of the Commission's offices has been declared wasteful or fruitless expenditure. The Commission needed new offices and it needed new furniture for those offices. It obtained both."84

The answer is really that, because the Commission required office space and furnishing, and it was sourced, there was nothing wrong with her conduct. It misses the unlawfulness of the process by ignoring the space norms of the Department of Public Works, which resulted in the overcharges. Nevertheless, the respondent's Counsel conceded in argument that the respondent acknowledged the flaws in this part of the process when the payment of R59 million was declared to be an irregular payment. It was further argued that, because there is no wasted space at the Commission's new offices, this Court should find that there was no money wasted. But that is putting that cart before the horse. The procurement process requires a determination of the required space according to prescripts, not an *ex post facto* justification that all the space was indeed used. The argument attempts to justify the unlawful conduct, but it is an attempted justification without a basis in fact or law.

[116] The respondent also denies the finding in the PwC report that the lease which was entered into was at an unnecessary cost of between R20,8 million and R110 million due to the calculation of interest at too high a rate. The denial is based on the fact that ". . . Mr Du Plessis has informed me that the interest rate charged was indeed market related . . . ." However, the reliance on the say-so of an unqualified person as to market related rentals cannot assist the respondent since it could never have formed the basis of a decision to incur expenses on behalf of the Commission. This is borne out by the subsequent finding in the PwC report (an expert forensic report) that the transaction was subject to too high an interest rate. There is nothing to controvert the detailed and reasoned evidence contained in the PwC report, nor was its expertise in dispute. Clearly, the respondent failed in her duties as the accounting

officer85 by failing to ensure that expenditure was not improperly incurred. In addition, she refuses to take responsibility for duties for which she is clearly accountable.

[117] Treasury said:86

"It is evident that Adv. Tlakula gave an instruction that the procurement process to be followed for the procurement of new head office premises was not in terms of the Electoral Commission policy or procedure. Adv. Tlakula did not give guidance or formally inform the various persons, including EXCO, what was expected of them in the evaluation process. The process that was then followed was also not in terms of the requirements of the PFMA and Treasury Regulations. There were numerous errors made in the process that has resulted in Abland being favoured at the expense of other bidders and in Abland being favoured at the expense of the Electoral Commission.

The expenditure on immovable items appears to have been made with little or no regard to what the actual cost was and at no stage is there evidence that Mr Du Plessis or Adv. Tlakula, who approved this expenditure, ensured that items were procured at market related prices. It also appears that they had little concern for what things cost and merely bought what they wanted."

[118] The PwC report then continues to find:87

"The procurement process followed was flawed in that, amongst others, the following occurred:

i. The advertisement setting out the building and lease requirements was inadequate.

ii. There was no tender briefing and no detailed tender specification document issued.

iii. The normal bid evaluation process was not followed and the bid evaluation was done by EXCO.

iv. The summary of the 10 bids prepared by and presented to EXCO by the Manager in the Office of the CEO for evaluation contained numerous errors.

v. EXCO members relied on the summary, referred to above, to perform the evaluation and prepare a shortlist of bidders on 15 May 2009, and did not refer to the actual bid documents.

vi. During an EXCO meeting on 19 June 2009, when the shortlisted bidders made presentations, the bid evaluation criteria were changed, to the benefit of Abland, without the non-shortlisted bidders being afforded the same opportunity.

vii. The lease agreement was signed on 21 August 2009, by the CEO, even although the tax clearance certificates for two of the five members of the Abland consortium are dated after this.

viii. The acquisition of moveable items, for R59 918 380, via Abland as part of a turnkey solution, were not tendered to the open market even though this is what Abland originally proposed.

ix. The budget for moveable items continually increased as the Electoral Commission management changed their requirements for fitting and furnishing the building."

[119] In addition, the PwC report finds: 88

"The rental being charged by Abland is not a fair market rental for the following reasons:

i. Too much space is being leased, 9 489m2, when the total space required should be in the region of 6 500m2. The nominal cost of the rentals, for this excess space for 10 years is approximately R110 million.

ii. Assuming the Electoral Commission space allocations of 9 489m2 were correct, the effect of rentalising tenant items at too high a rate and the high operating costs has meant that the Electoral Commission will pay at least R20.8m above expected market norms over the 10 year term of the lease."

These findings have, on a balance of probabilities, been shown to be correct.

[120] The PwC report further finds:89

"It is not possible to determine if value for money was received when purchasing movable items for R59 918 380 as most of these items were purchased without going out on tender or obtaining quotations. Abland have stated that there was no requirement to go out to the market to get competitive quotations as long as the purchases were within budget and were approved by the Electoral Commission. To date we have not been provided with copies of the original supplier invoices by the Electoral Commission as they do not have them and despite these being requested from Abland and one of the interior designers who sourced some of the suppliers they have also not provided these. We have therefore been unable to go back to the original suppliers to verify if the prices were market related or whether these suppliers were tax compliant."

It is common cause that there was not even a pretence to follow a process to acquire furnishing. This was unlawful. The respondent fails to give any credible justification for breaking the law.

[121] The respondent alleges that once she took the decision to embark on this truncated procedure, the EXCO was fully involved with the process. However, the respondent being the ultimate responsible official as accounting officer under the PFMA cannot invoke a collective responsibility to reduce her own responsibility by apportioning blame to those who served with her on the EXCO. It does not exonerate the respondent from her unlawful conduct.

[122] The respondent stated that the bids that were received, based on the improper advertisement, were dealt with by Mr Langtry (her office manager) who collated them in a spreadsheet. The spreadsheet was incorrect in certain material respects and because the respondent never checked the spreadsheet to ensure its accuracy in respect of the bids received, the spreadsheet that served before the EXCO was materially inaccurate and formed the basis for certain decisions made by the EXCO. No one was made aware of the fact

that the respondent did not verify the information contained in the spreadsheet. The inaccurate information

before the EXCO was therefore a direct result of the respondent's failure to follow a proper bid process, ie the failure to have an evaluation committee in place.

[123] The failure, which arose as a consequence of the respondent's decision to follow the attenuated process, was so serious that it resulted in the exclusion of a bidder (Khwela) who, according to the PwC report, was very likely to have prevailed in the bid. Several other fundamental "mistakes" were made in the evaluation of the Khwela proposal, all of which would have been avoided had the respondent followed the correct bidding procedure. It was the respondent's decision to follow the unlawful truncated procedure that resulted in the many failures which occurred thereafter.

[124] Mr Langtry does not supply a justification for the respondent's conduct. Neither does he or the respondent wish to take responsibility for the manner in which the bids were handled. But it was the decision of the respondent to employ the unlawful bid procedures that caused a materially erroneous shortlist of bidders to be placed before the EXCO. The fact that the respondent may not have been present at each and every meeting held by the EXCO is of no consequence, as she created the process which was then flawed throughout. The respondent failed to ascertain the correctness of the facts presented by Mr Langtry and to appreciate that Khwela had incorrectly and unfairly excluded, while Abland received a relaxation in its bid. Throughout the process, however, she remained responsible for the performance of the duties.[90]

[125] Each of the findings contained in the PwC report[91] is consequently factually correct. It is also correct when it states:

> "The procurement process followed was not fair, equitable, transparent, competitive, or cost efficient and some of the expenditure could have been avoided had reasonable care been taken."[92]

[126] In stark contrast, the respondent avers in her second response that:

> "I deny that these errors resulted in Abland being favoured at the expense of other bidders, as well as at the expense of the Commission."

Objectively, this statement, made under oath by the respondent, is untrue.

[127] What is clear is that the respondent failed to oversee the evaluation of the bidders, having decided to clothe the EXCO with that duty. This Court is of the view that once the respondent commenced on the extraordinary, attenuated road she should have taken control of and taken responsibility for the process. Since she failed to do so, the process contained gross irregularities.

[128] Counsel for the respondent argued:

> "60. Adv Tlakula accepted full responsibility for failing to comply with the relevant procurement legislation by disclosing the non-compliance in the financial statements of the Commission for the year 2010/2011. As

> a result, the Auditor-General declared all the expenditure for the current year on the lease agreement as irregular. The Auditor-General also declared the expenditure on the movable assets (the 'turnkey' transaction) as irregular after Adv Tlakula disclosed in the 2010/2011 financial statements that the turnkey transaction had been negotiated with the successful bidder. A total of R71 819 569 (being the lease payments plus the turnkey transaction) was declared as irregular. The audited financial statements were part of the Commission's Annual Report to the National Assembly, dated 31 July 2011 and signed by Dr Bam (the Chairperson) and Adv Tlakula, and presented to the Portfolio Committee on Home Affairs.
>
> 61. In June 2011, the Commission reported the irregular expenditure to National Treasury and sought condonation therefor. National Treasury replied that the accounting authority of the Commission was the body that was empowered to condone such irregular expenditure. The matter was therefore left in the hands of the Commission.
>
> 62. As the CEO of the Commission, Adv Tlakula was an employee of the Commission and thus subject to its discipline. The Commission did not see fit to subject Adv Tlakula to sanctions in terms of the PFMA or to other disciplinary measures for her failure to observe the relevant procurement statutes and regulations. We submit that it is clear that the Commission has decided not to take any further action against Adv Tlakula for the irregular expenditure recorded in the Public Protector's Report and the PwC Report.
>
> 63. The Auditor-General did not declare the expenditure on the lease or the turnkey transaction as fruitless and wasteful, or unauthorised, and accepted that there was no financial misconduct. Furthermore, Adv Tlakula has never been accused of financial misconduct while CEO and neither the Public Protector's nor the PwC Report finds so."

In my view, acceptance of the fact that the respondent caused irregular expenditure is acceptance of the respondent's misconduct.[93] The fact that the respondent disclosed her irregular conduct in the past, or the fact that she sought condonation for the conduct does not justify that conduct.[94] The fact that the Commission did not see fit to subject the respondent to sanctions or disciplinary measures,[95] too, does not detract from the nature of her conduct. The argument advanced can, at most, be utilised as mitigating factors, if they so qualify, but not as justification for her conduct.

[129] It was further submitted on behalf of the respondent that the "flaws" in the process referred to thus far are not indicative of dishonesty, impropriety or corruption. But the test is whether her conduct constitutes misconduct in that she contravened legal prescripts and failed to act within the requirements of the law set out herein before. The respondent's continued refusal to be accountable for her actions shows her failure to appreciate her wrongful conduct. If the conduct amounts to misconduct to

the extent that it is at odds with the requirement of the office, it would warrant her removal from office.

[130] The respondent, as a main theme before this Court, advanced the argument that her breaches, referred to below, were committed as an honest mistake on her part. However, she was appointed to a high office. It required her to obtain and have knowledge of the duties and the prescripts applicable to her. Tshabalala JP said in *Narot v 135 Smith Street Trust and others*:96

"This Court is acutely aware of the fact that many of those who come before it find the processes of the law difficult to understand. However, ignorance is no excuse for a complete lack of diligence or concern. Every litigant should ensure that his/her matter is being properly dealt with."

[131] In *Fischat v Nelson Mandela Bay Municipality*,97 Revelas J said:98

"Ignorance of the law, in my view, should not be open as an excuse to a lawyer, who was gainfully engaged by a municipality (or other organ of state) to do legal work on assumption of his legal expertise. Particularly not ignorance of the legal and procedures involved when he wishes to sue that organ of state for remuneration owing to him. It is fair to say that it can reasonably be expected from the applicant that he ought to have known of the statutory notice period."

[132] The following has been the reasoning of the Supreme Court of Appeal99 and has been the law for some decades:

"At this stage of our legal development it must be accepted that the cliché that 'every person is presumed to know the law' has no ground for its existence and that the view that 'ignorance of the law is no excuse" is not legally applicable in the light of the present day concept of *mens rea* in our law. But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved."

[133] In my view, the extent of the transgression, together with the serious consequences for the Commission, cannot be excused as an honest mistake. Her version is contradicted by both her statement to Parliament (that she took a deliberate decision to follow the truncated procedure) and the version published in the 2010 Annual Report100 (that compliance with the PFMA and other prescripts was being ensured). The respondent acknowledges that:

"As the Accounting Officer, I was responsible for the effective, efficient, economical and transparent use of the resources of the Commission."

Section 38(1)(a)(iii) of the PFMA, just above the duty of the accounting officer, requires:

"an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective."

It is significant that the respondent never says that she did not know of her obligations under the PFMA. She also did not insist on the process being a full tender process in terms of the Commission's policy. This again shows a deliberate decision not to comply with the policy known to her, which includes the hiring of goods and services for the Commission.

[134] The respondent's representations to Parliament are consistent with the facts stated in her affidavit. The representations are clear:

"30. In terms of section 38 of the PFMA an Accounting Officer must ensure that a constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent and cost-effective. This section places the legal responsibility for determining the procurement and provisioning system with the Accounting Officer.

31. Given that responsibility for determining the procurement and provisioning system vests with the Accounting officer, the authority to amend that process also vests with the Accounting Officer.

32. The Accounting Officer approved that the process to be used in the procurement of Riverside Office Park be different to the norm, given the fact that the matter was sufficiently significant and urgent. In 2009 the Electoral Commission was in the middle of conducting the 2009 general elections and a move had to be completed as soon as possible thereafter and seamlessly not to impede on the preparations for the municipal elections soon thereafter in 2011. This required precise management at a senior level."

Her about-turn in her later affidavits that she believed that the Commission's tender procedure did not apply to the procurement of lease agreements is consequently an argument of convenience and difficult to sustain. The two versions put up by the respondent are mutually destructive. One of the versions cannot be true. The respondent attached the Commission's letter to Treasury in which condonation was sought for irregular expenditure. It reads as follows:

"Although the CEO was *aware of the deviation* her approval was not evidenced in writing . . . ." (Emphasis added.)

It puts paid to the later version alleging that she had made a mistake.

[135] The respondent further contended that to err is human and even judges who err are not guilty of misconduct or removed from office. The comparison is neither available to the respondent, nor valid. Firstly, I am of the view that the respondent acted deliberately and that the honest mistake version is a version of convenience. Secondly, judges who err when exercising their judicial functions do not act unlawfully. The legality of conduct is determined by the prescripts of every particular case. Section 177(1)(a) of the Constitution provides for the

removal of a judge from office in the event of a judge being "guilty of gross misconduct." The difference in the standard to be applied to judges and

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commissioners is plain. It stands to reason that a reference to cases where judges might have erred is unhelpful.

[136] A further issue before this Court was the appropriateness of the respondent's participation in the bid process having regard to her relationship with Mr Mufamadi. The respondent and Mr Mufamadi were co-directors and co-shareholders in a company, Lahotsa Investments ("Lahotsa").[101] The respondent's version is that the company floundered in 2007; that the lease for the office terminated in 2008 and that since then the company has not been in active business. Secondly, the respondent states that she was not required to disclose her involvement with Mr Mufamadi in business, because Lahotsa was not itself going to participate in the contract that was the subject of consideration by the EXCO. This argument was advanced despite the fact that Lahotsa was the Black Economic Empowerment component of Abland, the successful bidder.

[137] The question remains whether there was indeed a conflict of interest and a duty to make disclosure. Measured against the provisions of section 10 of the Electoral Commission Act,[102] which is in congruence with the common law and applicable to all relevant situations, the respondent should not have participated in the proceedings where the successful bidder was evaluated. She plainly had an "other" interest with somebody who stood to benefit directly from the contract which she was considering. She had a subsisting business association with Mr Mufamadi in a company in which they were co-directors and co-shareholders and in which they had conducted business in the past. Therefore, the fact that Lehotsa was not in active business since 2008 is superseded by its connection to the successful bidder. The respondent could not be perceived to have been impartial in such circumstances. The relationship could certainly have influenced her judgement in respect of the bidding process.

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[138] The provisions of regulation 19,[103] which were directly applicable to the respondent at the time that she was head of the EXCO and chief electoral and accounting officer, also require of an official to disclose his or her relationship and to refrain from participation in the business dealings of the Commission that could be affected thereby. The requirement was applicable to the respondent whose business partner stood to benefit from her decisions. The result is that there was both a duty to disclose and a duty to refrain from participating in the process.

[139] In the second response the respondent refers to an extract of the Employees Policy Manual of the Electoral Commission. The manual provides:

> "All employees have a duty to promote the reputation and business of the IEC and not to make any personal gain at the expense of or as a result of their employment by the IEC. Decisions and functions carried out in the course and scope of employment must be directed at what is in the best interests of the IEC. Personal interests must not conflict with those of the IEC.
>
> Where a possible conflict of interest arises or where an employee has or obtains a financial *or other interest* in a company or firm with which the IEC enters into a business transaction, or where the interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Commission as soon as it arises and the employee must refrain from participation in any way in related business dealings. Written disclosure is effected by the employee making an appropriate entry in a register kept for this purpose in the office of the CEO." (Emphasis added.)

[140] Although the respondent only disavowed the making of any gain, ie receiving a direct financial benefit, the manual clearly and unmistakably accords with the legal position set out previously, namely that personal interests should not conflict with those of the Commission. The respondent continued with this private procurement process despite her acknowledgement as follows:

> "Despite the narrow wording of the policy, I fully accept that there could be circumstances in which it would be prudent for a Commission employee to disclose a personal or business relationship with persons doing business with the Commission and to recuse oneself from any involvement in any decisions involving these persons. However, in my judgement, this was not such a case."

[141] Once the respondent appreciated the duty to recuse, her subjective belief that, in this matter, she would be absolved from a recusal, is without foundation. Her personal involvement seems to have clouded her judgment and her ability to act objectively. But the absence of an explanation as to why she judged it as a matter as one where her recusal was not called for, is woefully inadequate. The court finds that the respondent is offering excuses rather than justification for her unlawful conduct. Mr Mufamadi, her business associate, was interested in the tender before the Commission and the respondent had an interest of the kind that could influence the outcome of the tender procedure. She was a

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key decision maker when the process commenced and proceeded therewith while her business partner was appearing as one of the interested parties in the bid. She therefore acted in violation of the Manual.

[142] Taking into account the fact that conflict provisions are not confined to financial interests but extend to other interests which are of such a kind as to influence the outcome of the process, the respondent acted contrary to the law. The respondent attempts to escape this conclusion by stating in her second response that this

aspect entails a subjective determination by her of whether she had an interest that may have influenced the outcome of her decision or benefit any person. However, as has been indicated, a conflict of interest is an objective question. Counsel for the applicants, submitted, in my view, aptly, that:

"A conflict of interest is an objective question. You are either conflicted or you are not. You are not given a discretion to subjectively determine whether you are conflicted. If that was the case nobody would ever become conflicted. So it is, with respect, simply not a submission that can be sensibly maintained."

The submission of Counsel for the applicants is, in my view, sound.104

[143] This Court is of the view that when a person has a direct financial interest in a process, it is a manifest conflict of interest to participate in such a process; but so too in circumstances where another person, who is a business partner of the first, has an interest in the bid. The question is whether that person's association with the other person is likely to give rise to a perception that he or she may be influenced by the existing relationship.105

[144] The respondent did not, in this case, refrain from participating, but instead steered the matter through the EXCO, which she chaired. When the competing bidders made representations to the EXCO, the respondent knew that one of the bidders was a company in which her business partner, Mr Mufamadi, was involved. She said that "I made nothing of this fact", which is a rather astonishing remark for a responsible employee who was becoming familiar with the bids. The document which served before the EXCO, chaired by the respondent, clearly set out Mr Mufamadi's curriculum vitae, including the fact that he was the chairman of Manaka, executive chairman of Lehotsa and that he was one of the:

". . . shareholders of Manaka Property Investments, a black owned company having about 50 000 m² under management with more being negotiated."106

[145] The respondent avers that she had looked at the bids prior to the EXCO meeting. The bidder had advertised the fact that Mr Mufamadi was executive chairman of Lehotsa as an additional attribute to it. The respondent should immediately have realised that her business partner was seeking to advance his company. She justifies her failure to remove herself from the bidding process on the basis of her disclosure of interests

in an annual disclosure of interests. Nowhere is it alleged that the disclosure was made to the Commission or to the members of the EXCO who were involved with the bid process. On the contrary, reliance on the annual and general declaration of interests forms in compliance with an Annual Disclosure Framework, which is a standard disclosure of interest form, is opportunistic. The Public Protector said:107

"Adv. Tlakula only declared her interest in Lehotsa Investments in the Commission's annual and general declaration of interests' forms in compliance with the annual Financial Disclosure Framework which is a standard disclosure of interest form and which did not relate to a specific procurement transaction. This declaration said nothing about her business relationship with Hon Mufamadi.

The declaration only covered Lehotsa as a company in which she has shares and not the names of her co-directors or shareholders. All the members of EXCO, including Adv. Tlakula, failed to disclose their business interests prior to participating in evaluation committee meetings that considered the procurement in violation of Chapter 4 of the Electoral Commission's Procurement Policy and Procedures. The conduct of Adv. Tlakula and her EXCO colleagues in this regard was improper and constituted maladministration."

Having regard to these facts, her reliance on the declaration of interests, which does not disclose her business relationship with Mr Mufamadi, is an inadequate attempt to justify her failure to disclose that which the law requires of her to disclose. The respondent's Counsel, wisely in my view, did not pursue this attempted justification.

[146] In addition, that very disclosure underscores her knowledge of her duty to disclose her business relationship with Mr Mufamadi and is the reason why she should have recused herself from the meetings where the bids were being discussed.

[147] The respondent was consequently presiding at a meeting when she had an ongoing business relationship with one of the bidders. This is aggravated by the fact that the bidder was relying on its association with Lehotsa, the respondent's business vehicle, at the meeting at which she had to take decisions. The respondent was in a position to influence the outcome of the process. In order for that process to be perceived as fair her disclosure of her business relationship was vital. She had a conflict which she was required to disclose and which necessitated that she absent herself from the meeting.

[148] Unsurprisingly, the Public Protector found as follows:

"The situation was exacerbated by the fact that Adv. Tlakula not only managed the bid selection and evaluation process, but also prompted the retraction of the original award of the contract to Menlyn Corporate Park though the final decision was taken by the Commission following her presentation when she recommended the two bidders resulting in the Commission awarding the contract to Abland."108

[149] These facts, in my view, place the respondent's perceived independence in jeopardy and so harmed the credibility, impartiality, independence and integrity of the Commission.

[150] Based on the reasoning of the Constitutional Court in *President of the Republic of South Africa and others v South African Rugby Football Union and others*,109 the respondent submitted that the perception relied upon by the applicants regarding her duty to recuse herself from the meeting where the bid was discussed, was based on incorrect facts as there was no conflict of interest between her and Mr Mufamadi. The submission

cannot be sustained. Objectively, the respondent indeed had a subsisting business relationship with Mr Mufamadi. That fact placed the respondent in conflict and she should have disclosed the connection and recused herself once she was aware of the facts. The cases relied upon by the respondent to show the nature of the relationship between parties where a recusal was necessary, are distinguishable, since none of those cases considered the relationship of business partners. The respondent's counsel submitted that the "errors" committed by the respondent do not impact on her ability to be in office. It is unfortunately so that extremely able persons have been found guilty of misconduct, but the ability of the individual cannot, and does not, diminish the unlawfulness of the conduct.

[151] By applying the principles set out herein to the facts, the court concludes that the respondent was required to comply with the procurement law and its prescripts. In addition, the court concludes that the respondent stood in a fiduciary duty towards the Commission and owed it a duty to disclose a potential conflict of interest. Significant procedural failures allowed by the respondent resulted in a wholly skewed procurement process. The skewed procurement process suffered from multiple infringements, which, in turn, favoured her business associate to the detriment of other bidders and at a cost substantially to the detriment of the Commission by causing it to incur unjustified expenditure. In addition, the respondent failed to abide by the conflict rules that were applicable to her office. The conduct of the respondent was inconsistent with her office and obligations as CEO and accounting officer; she had breached the norms that govern her office. It was also unlawful in circumstances where she was imbued with the particular responsibility to ensure proper legal process. The respondent failed in her constitutional obligations. Her wrongdoing shows that she misconducted herself seriously in dealing with the business of the Commission.

[152] Save in the respects where the respondent admits a violation of the law, the respondent refuses to be held accountable for her actions. She attempts to shift the blame to a collective responsibility of the EXCO or the Commission, she blames Mr Langtry and Mr Du Plessis for what they have done, but she fails to take that responsibility as the responsible accounting officer, which she is required to do by law.[110] However, the respondent should be held responsible for the irregular and unlawful

process which was initiated by her. Her failure to accept responsibility is deserving of censure as it constitutes a violation of the provisions of the PFMA. The conduct of the respondent is described by section 31 of the PFMA as "financial misconduct."[111] The respondent initiated and drove the deviation from the prescribed process, contrary to her duties and responsibilities,[112] constitutes malfeasance as referred to in *AllPay.*[113] On a conspectus of the evidence, the respondent's decision to deviate from compliance with the prescripts was wilful.

[153] In my view, the conduct of the respondent, which is of the nature described herein, risks the impairing of public confidence in the integrity and impartiality of the Commission. The applicants' disquiet that the independence of the Commission has been tainted, is justified. It is conduct of such a nature, that had it been known at the time of the respondent's appointment as commissioner, would in all probability have played a role in the decision whether or not to appoint her. The disquiet of the applicants was shared by the National Education Health and Allied Workers' Union ("NEHAWU"), members of which include employees of the Commission. I refer to this fact only to demonstrate that the perception was not only held by the applicants, but also by members of NEHAWU.

[154] The respondent compromised the integrity and independence of the Commission in violation of a requirement that such integrity and impartiality must be above suspicion and beyond question. This view finds its basis in *New National Party of South Africa v Government of the Republic of South Africa and others*:[114]

> ". . . independent institutions are an important structural component of our constitutional democracy. The Constitution obliges such institutions to be impartial and to perform their functions without fear, favour or prejudice. Other organs of state are obliged to assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness. It is clear that both constitutional obligations should be scrupulously observed."

[155] In *Ex parte Chairperson of the Constitutional Assembly*, *In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[115] the Constitutional Court pronounced this principle as follows:[116]

> "They perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution."

[156] The constitutional independence of the judiciary is subject to the same doctrine, and indeed it was with the purpose of securing public confidence in the courts that this doctrine was developed. The doctrine was explained in *Van Rooyen and others v S and others* (*General Council of the Bar of*

South Africa Intervening)[117] and I am of the view that the principles enunciated apply with equal force to an institution like the Commission. The Constitutional Court concluded as follows:[118]

> "That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen* where Le Dain J held that:
>
> > 'Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.'

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.

. . . I agree that an objective test properly contextualised is an appropriate test for the determination of the issues raised in the present case. The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. . . . Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts."(Footnotes omitted.)

[157] These considerations apply particularly strongly where the head of an institution is concerned. In *Justice Alliance of South Africa v President of Republic of South Africa and others*, *Freedom Under Law v President of Republic of South Africa and others*, *Centre for Applied Legal Studies and another v President of Republic of South Africa and others*,119 the Constitutional Court held, in striking down the statutory power of the President to extend the tenure of the Chief Justice,120 that such power "violates the principle of judicial independence", because it:

"may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference."

[158] The reasonable public perception of independence is of no less importance in respect of public institutions other than the Public Protector, the Auditor-General and the judiciary. Thus, in *Glenister v*

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President of the Republic of South Africa and others,121 concerning the independence of the Directorate of Priority Crime Investigation and particularly its head, the Constitutional Court held as follows:122

"This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy – protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."

[159] In my view, the respondent compromised the independence and integrity of the Commission to such an extent that her actions complained of constitute misconduct within the meaning of the Electoral Commission Act. It is conduct which renders her unsuitable for the office of a commissioner and destructive of the very values of the Commission.

[160] There was some debate as to the nature of the recommendations which this Court may, or is required, to make. Section 7(3)(ii) requires this Court to make a recommendation to a committee of the National Assembly. Such a recommendation can be any recommendation123 regarding the alleged misconduct. Any eventual finding of misconduct, which may lead to further steps, is that of the Committee of the National Assembly. Nevertheless, this court is required to make a recommendation based on the facts of the matter.124

Recommendation

[161] The court is of the view that the misconduct of the respondent has been established on a balance of probabilities and having regard to the provisions of sections 7(3)(ii) as read with 20(7) of the Electoral Commission Act, the following recommendation is made:

This Court recommends that a committee of the National Assembly adopts the facts, views and conclusions of the court and that it finds that the respondent has committed misconduct warranting her removal from office.

(Mthembu and Pather concurred in the judgment of Wepener J.)

[Editor's note: On 14 August 2014 the Constitutional Court dismissed an application for leave to appeal against the Electoral Court's judgment.]

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For the applicants:

D Unterhalter SC, *M du Plessis* and *M Lekoane* instructed by *Webber Wentzel*

For the respondent:

D Berger SC and *I Curry* instructed by *Mkhabela Huntley Adekeye Incorporated*

The following cases were referred to in the above judgment:

AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as *amici curiae*) 2014 (1) BCLR 1 (2014 (1) SA 604) (CC) – **Referred to**	626

Attorney-General, Namibia, *Ex parte*: *In re*: The Constitutional Relationship between the Attorney-General and the Prosecutor-General 1995 (8) BCLR 1070 (NmS) – **Referred to** 625

Bernstein and others v Bester and others NNO 1996 (4) BCLR 449 (1996 (2) SA 751; [1996] ZACC 2) (CC) – **Referred to** 610

Bongoza v Minister of Correctional Services and others 2002 (6) SA 330 (TkH) – **Referred to** 606

Chairperson of the Constitutional Assembly, *Ex parte*: *In re* Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (1) BCLR 1 (1997 (2) SA 97) (CC) – **Referred to** 648

Coetzee v Steenkamp [2010] JOL 25798 (NCK) – **Referred to** 641

Du Preez and another v Truth and Reconciliation Commission [1997] 2 All SA 1 (1997 (3) SA 204) (A) – **Referred to** 606

Faircape Property Developers (Pty) Ltd v Premier, Western Cape [1999] JOL 5402 (2000 (2) SA 54) (C) – **Referred to** 625

Fischat v Nelson Mandela Bay Municipality 2013 JDR 0313 (ECP) – **Referred to** 641

Freedom under Law v Acting Chairperson, Judicial Service Commission and others [2011] 3 All SA 513 (2011 (3) SA 549) (SCA) – **Referred to** 618

Geuking v President of the Republic of South Africa and others 2004 (9) BCLR 895 (2003 (3) SA 34; 2003 (1) SACR 404; [2002] ZACC 29 (CC) – **Referred to** 610

Glenister v President of the Republic of South Africa and others 2011 (7) BCLR 651 (2011 (3) SA 347) (CC) – **Referred to** 649

Harmony Gold Mining Company Ltd v Regional Director, Free State Department of Water Affairs and others [2014] 1 All SA 553 (2014 (3) SA 149) (SCA) – **Referred to** 610

Hepple and others v Law Society of the Northern Provinces [2014] 3 All SA 408 ([2014] ZASCA 75) (SCA) – **Referred to** 618

Justice Alliance of South Africa v President of the Republic of South Africa and others 2011 (10) BCLR 1017 (2011 (5) SA 388) (CC) – **Referred to** 649

Kaunda and others v President of the RSA and others (2) 2004 (10) BCLR 1009 (2005 (4) SA 235) (CC) – **Referred to** 608

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Liberal Party v The Electoral Commission and others 2004 (8) BCLR 810 (CC) – **Referred to** 605

Lötter v Electoral Commission and others (006/2014) ZAEC 3 (19 May 2014) – **Referred to** 604

Narot v 135 Smith Street Trust and others [2008] JOL 22433 (2008 JDR 0915) (D) – **Referred to** 641

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (2012 (4) SA 593) (SCA) – **Referred to** 610

National Director of Public Prosecutions and another v Mohamed NO and others 2003 (5) BCLR 476 (2003 (4) SA 1; 2003 (1) SACR 561) (CC) – **Referred to** 610

New National Party of South Africa v Government of the Republic of South Africa and others 1999 (5) BCLR 489 (1999 (3) SA 199) (CC) – **Referred to** 648

Nyembezi v Law Society, Natal [1981] 2 All SA 74 (1981 (2) SA 752) (A) – **Referred to** 617

Olivier v Die Kaapse Balieraad [1972] 3 All SA 431 (1972 (3) SA 485) (A) – **Referred to** 617

Phillips v Fieldstone Africa (Pty) Ltd and another [2004] 1 All SA 150 (2004 (3) SA 45) (SCA) – **Referred to** 628

Porritt, *Ex parte* [1991] 3 All SA 156 (1991 (3) SA 866) (N) – **Referred to** 600

President of the Court of Appeal v Prime Minister and others [2014] LSCA 1 (3 April 2014) – **Referred to**	602
President of the Republic of South Africa and others v South African Rugby Football Union and others 1999 (7) BCLR 725 (1999 (4) SA 147) (CC) – **Referred to**	647
Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 – **Referred to**	627
S v De Blom [1977] 4 All SA 70 (1977 (3) SA 513) (A) – **Referred to**	641
Schierhout v Union Government (Minister of Justice) 1919 AD 30 – **Referred to**	600
Summerley v Law Society, Northern Provinces [2006] JOL 17431 (2006 (5) SA 613) (SCA) – **Referred to**	617
Tantoush v Refugee Appeal Board and others 2008 (1) SA 232 (T) – **Referred to**	608
Van Rooyen and others v S and others (General Council of the Bar of South Africa Intervening) 2002 (8) BCLR 810 (2002 (5) SA 246) (CC) – **Referred to**	648
Volvo (Southern Africa) (Pty) Ltd v Yssel [2009] 4 All SA 497 (2009 (6) SA 531) (SCA) – **Referred to**	628
Walele v City of Cape Town and others 2008 (11) BCLR 1067 (2008 (6) SA 129) (CC) – **Referred to**	601

Footnotes

1 Act 51 of 1996.
2 Rules Regulating the Conduct of the Proceedings of the Electoral Court.
3 See paras [5] and [6], *supra*.
4 Although the applicants took a somewhat different view in replying argument.
5 "194(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on –
(a) on the grounds of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly;
(c) the adoption by the Assembly of a resolution calling for that person's removal from office."
6 *Schierhout v Union Government* (*Minister of Justice*) 1919 AD 30 at 47.
7 1991 (3) SA 866 (N) at 870J–871B [also reported at [1991] 3 All SA 156 (N) – Ed].
8 2008 (6) SA 129 (CC) at para [90] [also reported at 2008 (11) BCLR 1067 (CC) – Ed].
9 See *The President of the Court of Appeal v The Prime Minister and others* [2014] LSCA 1 (3 April 2014) at para [25] where Brand JA said:
"It is true, as the appellant argued, that he was not formally invited by the Prime Minister to make representations as to why the request for the appointment of the Tribunal should not be made. Consequently, so he contended, his answer to the allegations in his replying affidavit was not a response to an invitation of that kind. I accept that the appellant was not invited to make representations regarding the appointment of the Tribunal and that what he said in his replying affidavit cannot be construed as having been such a response. It is also true that two of the allegations relied upon by the Prime Minister in his letter of 22 August 2013 had not been referred to in the answering affidavit in the first application. In consequence, the appellant had no opportunity to respond to these allegations either before the Prime Minister's impugned request was made to the King. But it is difficult to think of any reason why his response to the allegations would have been any different simply because it was given for a different purpose."
10 Public Protector, Report on an investigation into allegations of maladministration and corruption in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission, Report No 13 of 2013/2014, August 2013 ("Public Protector's report").
11 *Lötter v Electoral Commission and others* (006/2014) ZAEC 3 (19 May 2014) at para [12].
12 Public Protector's report para 11.2.3.
13 PwC, National Treasury Forensic Investigation: Electoral Commission – Riverside Office Park, 14 December 2013.
14 See *Lötter*, *supra* at para [7]. See also *Liberal Party v The Electoral Commission and others* 2004 (8) BCLR 810 (CC) at para [11].
15 2002 (6) SA 330 (TkH) at para [12].
16 *Du Preez and another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) [also reported at [1997] 2 All SA 1 (A) – Ed].
17 R 8(1).
18 S 7(3)(a)(i) of the Electoral Commission Act.
19 "9(2) No member of the Commission –
(c) may, by his or her membership, association, statement, conduct or in any other manner place in jeopardy his or her perceived independence, or in any other manner harm the credibility, impartiality, independence or integrity of the Commission;. . . ."
20 2005 (4) SA 235 (CC) [also reported as *Kaunda and others v President of the RSA and others* (*2*) at 2004 (10) BCLR 1009 (CC) – Ed].
21 *Kaunda* at para [123]. O'Regan J confirmed this position at para [265].
22 2008 (1) SA 232 (T) at para [19].
23 S 182 of the Constitution.
24 2014 (3) SA 149 (SCA) at para [22] [also reported at [2014] 1 All SA 553 (SCA) – Ed].
25 Also see *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449; [1996] ZACC 2) para [105]; *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) (2003 (1) SACR 561; 2003 (5) BCLR 476) para [48] and *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) (2003 (1) SACR 404;

2004 (9) BCLR 895; [2002] ZACC 29) para [20].

26 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] [also reported at [2012] 2 All SA 262 (SCA) – Ed].

27 See *Porritt* and *Walele*, *supra*.

28 The complete findings are as follows at para 10.7.7 of the Public Protector's report:

> "10.7.17 Adv. Tlakula's improper conduct and maladministration in this regard, in particular the non-compliance with relevant procurement prescripts as well as her undisclosed and unmanaged conflict of interest had the impact of:
>
> 10.7.17.1 Risking of loss of public confidence in the Electoral Commission as an organ of state in open and transparent procurement of goods and services;
>
> 10.7.17.2 Risking impairment of the reputation of the Electoral Commission as an impartial constitutional body with optimal levels of integrity;
>
> 10.7.17.3 Fostering a perception from potential service providers that they cannot expect fair and equal treatment from Electoral Commission; and
>
> 10.7.17.4 Risking the possibility of an asset procurement process that is not cost effective, through failure to ensure that the procurement of assets is tested in the open market, a systemic problem that afflicts most organs of state."

29 PwC report para 14.064.

30 PwC report para 14.061.

31 PwC report para 14.066.

32 PwC report para 14.071.

33 Public Protector's report para 10.7.1.

34 Public Protector's report para 10.7.2.

35 Public Protector's report para 7.2.2.3.

36 Public Protector's report para 10.7.17.

37 See para 61 *infra*.

38 Preferential Procurement Policy Framework Act 5 of 2000.

39 Para [21], *supra*.

40 See *Nyembezi v Law Society*, *Natal* 1981 (2) SA 752 (A) at 756H–757A [also reported at [1981] 2 All SA 74 (A) –Ed].

41 1972 (3) SA 485 (A) at 496 [also reported at [1972] 3 All SA 431 (A) – Ed].

42 *Nyembezi* at 756H–757A: See also *Summerley v Law Society*, *Northern Provinces* 2006 (5) SA 613 (SCA) at 615B–F [also reported at [2006] JOL 17431 (SCA) – Ed].

43 2011 (3) SA 549 (SCA) at para [46] [also reported at [2011] 3 All SA 513 (SCA) – Ed].

44 (507/2013); [2014] ZASCA 75 (29 May 2014,) at para [9] [reported at [2014] 3 All SA 408 (SCA) – Ed].

45 Act 1 of 1999.

46 General notice No. R. 514 of 18 May 2000, Regulation *Gazette* No. 6816.

47 At 36–38.

48 PwC report at para 6.080.

49 S 195(1)(a) of the Constitution.

50 *Government Liability*: *South Africa and the Commonwealth* (1ed) (2010) para 9.5.1 at 223–224.

51 1995 (8) BCLR 1070 (NmS) at 1078F.

52 Professor of Law; Deputy Vice-Chancellor and Head: College of Law and Management Studies, University of Kwazulu-Natal.

53 *The right to health care in the specific context of access to HIV/AIDS medicines*: *What can South Africa and Uganda learn from each other?* 2010 AHRLJ 105 at 128.

54 *Faircape Property Developers* (*Pty*) *Ltd v Premier*, *Western Cape* 2000 (2) SA 54 (C) at 65E–F [also reported at [1999] JOL 5402 (C) – Ed].

55 Schedler, Andreas (1999). "Conceptualising Accountability". In Andreas Schedler, Larry Diamond, Marc F. Plattner. *The Self-Restraining State*: *Power and Accountability in New Democracies*. London: Lynne Rienner Publishers at 13–28.

56 "A delegation or instruction to an official in terms of subsection (1) –

> (d) does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty."

57 2014 (1) SA 604 (CC) [also reported as *AllPay Consolidated Investment Holdings* (*Pty*) *Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* (*Corruption Watch and another as amici curiae*) at 2014 (1) BCLR 1 (CC) – Ed].

58 *AllPay* at para [27].

59 *AllPay* at para [24].

60 1921 AD 168.

61 *Robinson* at 177–178.

62 *Robinson* at 178.

63 *Robinson* at 179.

64 *Robinson* at 180.

65 2009 (6) SA 531 (SCA) [also reported at [2009] 4 All SA 497 (SCA) – Ed].

66 At paras [16]–[17].

67 2004 (3) SA 45 (SCA) at 465 [also reported at [2004] 1 All SA 150 (SCA) – Ed].

68 *Phillips* at para [31].

69 S 12(2)(a) of the Electoral Commission Act.

70 S 12(2)(b) of the Electoral Commission Act states that the CEO of the Commission is its accounting officer for purposes of the Exchequer Act 66 of 1975, which latter Act was repealed and replaced by the PFMA.

71 *AllPay* at para [36].

72 At 157–158.

73 Public Protector's report para 10.2.2.

74 The respondent's Counsel accepted this in argument:

> "Having made the decision that she did, it was inevitable that instances of non-compliance with the relevant procurement legislation would occur. So it happened that the advertisement calling for bids did not contain all that was required for a formal Request for Bids; the same advertisement was published in five national newspapers but not the Government Tender Bulletin; the time stated in the advertisement for submission of bids was 10 days and not the required 21 days; and the bid specification, evaluation and adjudication roles were performed by Mr du Plessis (signed off by Adv Tlakula), EXCO and the Commission respectively, instead of the roles being spread between the Evaluation Committee, the Procurement Committee, EXCO and the Commission."

75 Public Protector's report para 10.2.3.
76 In the 2010 annual report of the Commission, the respondent asserted the following: "Policy review workshops were held and policy review had been attended to. All applicable Supply Chain Management directives from National Treasury were given immediate attention/effect". She also said: "Staff trained on procurement policy and procedural matters" and "Policy documents and information circulated to all staff". The report also states that:

> "During the year of under review the Commission fully accepted its obligations in respect of Supply Chain management in terms of section 16A of the Treasury Regulations' and 'Continues review of asset policies, procedures and processes to ensure compliance with the requirements of the Public Finance Management Act, 199 (Act 1 of 1999) (GRAP) and International Financial Reporting Standards (IFRS)."

77 Public Protector's report paras 10.2.13–10.2.14.
78 Preferential Procurement Policy Framework Act 5 of 2000.
79 S 38 of the PFMA.
80 PwC report para 14.022.
81 At para 14.057.
82 Public Protector's report para 9.11.15.
83 Public Protector's report para 6.3.24.
84 See para 88 of the respondent's affidavit in terms of r 8(2).
85 See paras [70]–[79], *supra*.
86 At paras 14.061 and 14.062 of the PwC report.
87 At para 14.065.
88 At para 14.066.
89 At para 14.070.
90 S 44(2)(d) of the PFMA.
91 At para 14.065.
92 PwC report at para 14.064.
93 See s 81 of the PFMA which provides that the permitting of an irregular expense is "financial misconduct".
94 Treasury refused to grant condonation.
95 Despite having been directed by Treasury to deal with the irregular expenditure.
96 2008 JDR 0915 (D) at para [30] [also reported at [2008] JOL 22433 (D) – Ed].
97 2013 JDR 0313 (ECP).
98 *Fischat* at para [21].
99 *S v De Blom* 1977 (3) SA 513 (A) at 514E–F [also reported at [1977] 4 All SA 70 (A) – Ed]. Also see *Coetzee v Steenkamp* [2010] JOL 25798 (NCK) at para [10].
100 See fn 76, *supra*.
101 As described in para [49], *supra*.
102 S 10 of the Electoral Commission Act provides:

> "(1) Subject to subsection (2), a member may not at any meeting of the Commission during the discussion of any matter before such meeting in respect of which he or she has any financial or other interest which might preclude him or her from performing his or her functions in a fair, impartial and proper manner –
>
> (a) be present;
> (b) cast a vote; or
> (c) in any other manner participate in the proceedings thereof.
>
> (2) If at any stage during the course of any proceedings before the Commission it appears that any member has or may have an interest which may cause such a conflict of interests to arise on his or her part –
>
> (a) such member shall forthwith and fully disclose the nature of his or her interest and leave the meeting so as to enable the remaining members to discuss the matter and determine whether such member is precluded from participating in such meeting by reason of a conflict of interests; and
> (b) such disclosure and the decision taken by the remaining members regarding such determination, shall be recorded in the minutes of the meeting.
>
> (3) If any member fails to disclose any interest as required by subsection (2) or, subject to that subsection, is present at a meeting of the Commission or in any manner whatsoever participates in the proceedings of the Commission in relation to such matter, such proceedings may be reviewed and varied or set aside by the Commission."

103 See fn 46, *supra*.
104 *Nyembezi,* fn 40 *supra*.
105 See *Phillips*, fn 67 *supra*.
106 Public Protector's report para 6.3.20.12.
107 Public Protector's report paras 10.7.5 and 10.7.6
108 Public Protector's report para 10.7.11.
109 1999 (4) SA 147 (CC) at para [48] [also reported at 1999 (7) BCLR 725 (CC) – Ed].
110 See s 38 of the PFMA.
111 See para [67], *supra*.
112 See, *inter alia,* para [64], *supra*.
113 See para [88], *supra*.
114 1999 (3) SA 199 (CC) at para [162] [also reported at 1999 (5) BCLR 489 (CC) – Ed].
115 1997 (2) SA 97 (CC) [also reported at 1997 (1) BCLR 1 (CC) – Ed].
116 At para [142].
117 2002 (5) SA 246 (CC) [also reported at 2002 (8) BCLR 810 (CC) – Ed].
118 At paras [32] and [34].
119 2011 (5) SA 388 (CC) [also reported as *Justice Alliance of South Africa v President of the Republic of South Africa and others* at 2011 (10) BCLR 1017 (CC) – Ed].
120 *Justice Alliance* at para [68].
121 2011 (3) SA 347 (CC) at para [207] [also reported at 2011 (7) BCLR 651 (CC) – Ed].
122 *Glenister* at para [207].
123 S 20(7) of the Electoral Commission Act.
124 See paras [9]–[11], *supra*.

Division:	Constitutional Court of South Africa
Date:	10/06/2014
Case No:	**CCT133/13**
Before:	DE Moseneke Acting Chief Justice, TL Skweyiya Acting Deputy Chief Justice, E Cameron, J Froneman, CN Jafta, SSV Khampepe, M Madlanga, JV van der Westhuizen, RM Zondo Justices, N Dambuza and SA Majiedt Acting Justices

Administrative justice *– administrative action – definition – section 1 of the Promotion of Administrative Justice Act 3 of 2000 – excluding an exercise of the executive powers or functions of the National Executive – distinction between administrative action and executive action – discussed in context of scrutiny of an exercise of the power of Minister of Defence to remove members of the Armscor Board of Directors in terms of section 8(c) of the Armaments Corporation of South Africa Limited Act 51 of 2003.*

Company *– State-owned company – application of Companies Act 71 of 2008 with respect to State-owned companies – section 9 of Act 71 of 2008 – State-owned companies to be treated as public companies unless a Cabinet member has procured an exemption from the obligation to comply with the Companies Act – Armaments Corporation of South Africa SOC Ltd – power of Minister of Defence to remove members of board in terms of section 8(c) of the Armaments Corporation of South Africa Limited Act 51 of 2003 – in exercising such power Minister nevertheless obliged to comply with procedural requirements of section 71 of the Companies Act.*

Defence force *– Department of Defence – matériel requirements and technology requirements – Armaments Corporation of South Africa SOC Ltd (Armscor) – Board of directors – vacation of office by member of Board – Minister's power to terminate a director's membership on good cause shown – section 8(c) of Act 51 of 2003 – exercising such power Minister nevertheless obliged to comply with procedural requirements of section 71 of the Companies Act.*

Editor's Summary

First and Second Respondents were Lt-Gen Maomela Motau and Ms Refiloe Mokoena who were respectively the Chairperson and Deputy Chairperson of the Board of the Third Respondent until August 2013, when they were removed from the Board by the Applicant, the Minister of Defence ("the Minister"). Third Respondent ("Armscor") is a wholly State-owned entity regulated by the Armaments Corporation of South Africa Limited Act 51 of 2003 ("the Armscor Act") and intended to serve as the Defence Department's armaments and technology procurement agency.

The Minister terminated First and Second Respondents' membership of the Board on 8 August 2013, in terms of section 8(c) of the Armscor Act which provides that "[a] member of the Board must vacate office if his or her services are terminated by the

Minister on good cause shown." The Minister justified her decision by pointing to various procurement projects which had failed to progress timeously as a result of the Board's decisions or inaction; Armscor's failure to conclude a service level agreement with the Department of Defence as required by the Armscor Act; and certain complaints which she had received about Armscor from the defence industry, indicating that the relationship between the two had broken down. First and Second Respondents then approached the High Court for urgent relief. The High Court found in favour of First and Second Respondents. It concluded that the Minister's decision was administrative rather than executive action, and thus, in the circumstances, fell to be set aside on several grounds: The Minister committed an error of law insofar as she acted under the misapprehension that her conduct was executive rather than administrative in nature; she acted unfairly in failing to give them an opportunity, with appropriate notice, to explain why their appointments should not be terminated; she acted on the basis of an ulterior motive in that she expressly acknowledged that their removal was a "political" rather than a legal matter; and her decision was not rational.

The Minister was granted leave to appeal directly to the Constitutional Court.

The issues that arose for decision were: Whether the Minister's decision constituted administrative or executive action; whether the Minister had shown good cause for her decision as required by section 8(c) of the Armscor Act; and whether the Minister was bound by any procedural constraints in exercising her section 8(c) power.

A majority (in a judgment *per* Khampepe J with Moseneke ACJ, Skweyiya ADCJ, Cameron, Froneman, Van der Westhuizen JJ, Dambuza and Majiedt AJJ concurring) concluded that the Minister's decision amounted to executive rather than administrative action. The Minister's power to terminate the services of Board members was closely related to the formulation of policy and was an adjunct of her policy-making power. The decision could not therefore be reviewed under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). In the circumstances of this case the necessary good cause to terminate the services of First and Second Respondents was present. The Minister's decision was rational. However, in making her decision, the Minister was also required to comply with section 71(1) and (2) of the Companies Act 71 of 2008. Those provisions deal with the removal of directors of a company. Her failure to do so rendered her decision unlawful. Nevertheless, for reasons that were set out, it would not be just and equitable in the circumstances to set the decision aside.

A minority in a dissenting judgment (*per* Jafta J with Madlanga and Zondo JJ concurring) concluded that the Minister's decision amounted to administrative action and that PAJA applied. The decision had been taken in a procedurally unfair manner because First and Second Respondent's membership was terminated without a hearing. The decision was unlawful and the minority would have set it aside.

Accordingly, the appeal was upheld. The order of the High Court was set aside and replaced with an order declaring that the Minister acted unlawfully insofar as she terminated the services of First and Second Respondents

on the Armscor Board without following the procedure set out in section 71(1) and (2) of the Companies Act; and that the Minister's decision to terminate their services was not set aside.

Judgment

Khampepe J:

Introduction

[1] This is a case about accountability. To what standard of performance may a Minister, as the responsible member of the Executive, hold the

leadership of a State-owned entity that falls under her supervisory control? And to what standard should a court of law hold that Minister when she exercises her powers of oversight in relation to that State-owned entity? These are important questions for any democracy that takes seriously the values of accountability and good governance.

[2] This matter comes before us by way of an application for leave to appeal directly against a judgment of the North Gauteng High Court, Pretoria ("High Court").1 It relates to the decision of the appellant, the Minister of Defence and Military Veterans ("Minister"), to remove the first and second respondents ("General Motau"2 and "Ms Mokoena") from the Board of Directors ("Board") of the third respondent, the Armaments Corporation of South Africa (SOC) Limited ("Armscor"). General Motau and Ms Mokoena served as the Chairperson and Deputy Chairperson of the Board respectively.

Facts

[3] Armscor is a wholly State-owned entity regulated by the Armscor Act.3 The State exercises ownership control of Armscor through the Minister.4 Armscor was incorporated primarily to provide South Africa's armed services with military material, equipment, facilities and services,5 as well as to meet the "defence technology, research, development, analysis, test and evaluation requirements" of the Department of Defence ("Department").6

In essence, Armscor is the Department's armaments and technology procurement agency.7

[4] Armscor's affairs are managed and controlled by its Board, comprising nine non-executive members and two executive members (a chief executive officer ("CEO") and a chief financial officer ("CFO")).8 General Motau and Ms Mokoena were appointed to the Board (as non-executive members) by the Minister's predecessor in terms of section 7(1) and (2) of the Armscor Act. Those provisions read as follows:

> "(1) The non-executive members of the Board must be appointed by the Minister on the grounds of their knowledge and experience which, when considered collectively, should enable them to attain the objectives of [Armscor].
>
> (2) The Minister must designate one of the non-executive members of the Board as chairperson of the Board and another one as deputy chairperson of the Board."

In terms of section 7(5)(a) of the Armscor Act, non-executive Board members are appointed for a period of three years. On 1 May 2011, General Motau was designated as Chairperson and Ms Mokoena was designated as Deputy Chairperson. The terms of General Motau and Ms Mokoena expired on 30 April 2014.

[5] The Minister took office on 12 June 2012. At that time, there was a live dispute between General Motau and the Minister's predecessor, who had attempted to dismiss General Motau as the Chairperson and appoint Ms Mokoena in his stead. General Motau, however, refused to accept his dismissal, asserting that it was vitiated by a procedural irregularity.

[6] In order to resolve any uncertainty at the start of her tenure, the Minister, having discussed the matter with the Board, appointed a committee consisting of three of its members to resolve the issue. After consulting the affected parties, the committee recommended that General Motau be retained as Chairperson and that Ms Mokoena remain as Deputy Chairperson. This was accepted by the Minister and communicated to the parties.

[7] In order to address various governance issues, the Minister convened three meetings with the Board (on 19 March 2013, 28 March 2013 and 4 June 2013), none of which was attended by General Motau. Ms Mokoena failed to attend the meeting held on 4 June 2013. The Minister expressed her displeasure to General Motau in a letter dated 11 June 2013. In reply the following day, General Motau bemoaned the late notice which the Minister had given of the meetings and explained that he had been away when the meetings were held. He also reminded her that Board members "make a living in other endeavours", and asked that she schedule future meetings with the Board through him, as the Chairperson.

[8] On 8 August 2013, by letter, the Minister terminated General Motau and Ms Mokoena's membership of the Board in terms of section 8(c) of the Armscor Act. Section 8(c) provides that "[a] member of the Board must vacate office if his or her services are terminated by the Minister on good cause shown." The letter to

General Motau explained that:

> "the manner in which you exercised your powers, through your managerial style and the decisions you took . . . has resulted in a situation where [Armscor] has not been able to meet the defence matériel requirements of the Department effectively, efficiently and economically."

[9] The Minister justified her decision on three bases. First, she cited various procurement projects which had failed to progress timeously, allegedly as a result of the Board's decisions or inaction.[9] The Minister further listed nine projects as examples of this trend, placing particular emphasis on Project Swatch and Project Porthole. Project Swatch was initiated to replace obsolete camping equipment for deployed South African National Defence Force ("SANDF") troops. Owing in large part to the Board's failure to grant the necessary approvals, the project had been delayed by 36 months, during which time no funds could be spent. Ultimately, less equipment could be procured with the funds allocated for the project because of inflation.

[10] Project Porthole, a "high priority project" for the South African Special Forces, was established to acquire a specialised high-altitude parachute system. The system had become outdated and was in need of replacement. Due to delays in the contracting process, the funds of the Special Forces Portfolio were not used to acquire the parachuting equipment in the 2011/12 and 2012/13 financial years. It appears that the equipment had still not been procured when the Minister removed General Motau and Ms Mokoena. The Department estimates the financial loss flowing from the delays to be in excess of R70 million.

[11] The details of the delays were confirmed before the High Court in an affidavit attested to by the Department's Chief of Defence Matériel, Mr Visser. He had been tasked by the Secretary of Defence, at the Minister's behest, to investigate and report on procurement delays at Armscor. Although the report and the procurement projects were classified as confidential, with the result that the report could not be attached to his affidavit, Mr Visser was given licence to talk to three of the most important projects. In addition to Projects Porthole and Swatch, Mr Visser discussed delays in relation to Project Vagrant (one of the nine projects referred to in the Minister's correspondence).[10]

[12] Second, the Minister was unhappy that Armscor had not been able to conclude a service level agreement with the Department as required by section 5 of the Armscor Act. In particular, she cited the latest proposal by the Board for a service charge to be included in the agreement, which the chief financial officer of the Department had described as "unaffordable". She partially ascribed the inability to conclude a service level agreement to the manner in which General Motau and Ms Mokoena had been leading Armscor.

[13] Lastly, the Minister's decision was premised on complaints she had received about Armscor from members of the defence industry. From these she inferred that the Corporation's relationship with the industry had broken down.[11] This, it was suggested, rendered Armscor unable to "provide marketing support to defence-related industries in respect of defence matériel" as required by the Armscor Act.[12]

[14] The Minister concluded her correspondence by stating that, in her opinion, General Motau and Ms Mokoena had "not acted in the best interests of the Department" and that their services as Chairperson and Deputy Chairperson of the Board were therefore terminated.

[15] Following the termination of General Motau and Ms Mokoena's services, the Minister convened a meeting on 14 August 2013 with the remaining members of the Board. In a statement made at the start of the meeting, the Minister explained her decision in much the same terms as she had in her correspondence with General Motau and Ms Mokoena. In addition, however, the Minister made some remarks which became points of contention in the High Court and in this Court. First, the Minister said she believed that the removal of General Motau and Ms Mokoena was "not a legal matter", but a "political matter . . . informed by [her] experience". She expressed the hope that the matter would not get to a point where the Department would need to "engage a legal rep" as she did not think that this was necessary. In relation to the removal of Ms Mokoena, the Minister also made the following statement:

> "For me it was the correct thing to do that when I removed the chair, I removed both the chair and the deputy. Because I also think there would have been an expectation that I had an obligation to appoint the deputy chair because I'm removing the chair."

This expectation, the Minister seemed to reason, arose from Ms Mokoena's previous temporary appointment as Chairperson and was evinced

in a letter penned by Ms Mokoena on 27 February 2013, in which she requested clarification from the Minister on her "decision on the chairmanship of Armscor." The Minister understood this letter to intimate that Ms Mokoena still had aspirations of being Chairperson.

[16] The Minister also explained her decision to target General Motau and Ms Mokoena for dismissal, rather than relieving the entire Board. While she acknowledged that the Board as a collective might be blamed for some of Armscor's failings, the Minister stated that she was concerned about the impact of the wholesale dismissal of the Board on the continued functioning of the Corporation.

In the High Court

[17] Following the Minister's decision to terminate their services, General Motau and Ms Mokoena approached the High Court for urgent relief. They sought to have the Minister's decision set aside on the basis that it was unlawful, unconstitutional and invalid. They also sought a declarator confirming them in their respective positions as Chairperson and Deputy Chairperson of the Board. The only opposition came from the Minister.

Armscor, although cited, did not participate.

[18] Legodi J granted judgment in favour of General Motau and Ms Mokoena. He concluded that the Minister's decision was administrative rather than executive action. This was because the decision met the positive requirements of the administrative-action definition and because it was not expressly excluded from the ambit of the Promotion of Administrative Justice Act13 ("PAJA"), as are some other forms of conduct by members of the National Executive.

[19] Flowing from that conclusion, the High Court held that the decision fell to be set aside on several grounds. First, the Minister committed an error of law14 in terminating the services of General Motau and Ms Mokoena insofar as she acted under the misapprehension that her conduct was executive rather than administrative in nature. Second, the Minister acted unfairly15 in failing to give General Motau and Ms Mokoena an opportunity, with appropriate notice, to explain why their appointments should not be terminated. Third, the Minister acted on the basis of an ulterior motive16 in that she expressly acknowledged that the removal of General Motau and Ms Mokoena was a "political" rather than a legal matter.17 Fourth, in relation to Ms Mokoena, the Minister's decision to dismiss her

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was not rational18 to the extent that her membership of the Board was "terminated simply on the basis that the Minister [did] not know what to do with her."19

[20] Non-compliance with PAJA was not the only source of unlawfulness identified by the High Court. It also found that it was inappropriate for the Minister to have singled out General Motau and Ms Mokoena for termination of their membership on the Board. This was because of the Board's collective responsibility for the management of Armscor, and the fact that there are two executive directors (the CEO and the CFO) who are responsible for the management and control of Armscor's daily affairs. It reasoned that the Minister failed to identify particular occurrences for which General Motau and Ms Mokoena were directly responsible, and thus failed to show the good cause required by section 8(c) of the Armscor Act.

[21] Finally, the High Court granted a punitive costs order (on an attorney-and-own client scale) against the Minister. As justification it cited the Minister's failure to observe the requirements of procedural fairness, which it deemed to be unreasonable; her failure to respond to a letter General Motau had addressed to her, which supposedly conveyed the respect the Board had for the Minister; and the Minister's comments during the meeting of 14 August 2013,20 which revealed that she had no rational basis for terminating General Motau and Ms Mokoena's services.

Preliminary matters

[22] In terms of an order dated 8 November 2013, the Minister was granted leave to appeal directly to this Court. Therefore, nothing further needs to be said in this regard.

[23] All the respondents have filed applications for condonation. Armscor filed their written submissions two weeks out of time. Counsel for General Motau and Ms Mokoena also filed their submissions late. The Court would like to thank Advocates Dewrance and Muvangua of the Johannesburg Bar Society, who appeared *pro bono* on behalf of General Motau and Ms Mokoena, for their valued assistance in this matter.21

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[24] It would not be in the interests of justice22 to refuse condonation in this case. This is a matter of great public importance,23 and we should be slow to refuse argument that might provide assistance on complex issues. The Minister did not object to the granting of condonation to any of the respondents, nor did she cite any prejudice suffered as a result of the respondents' delays.24 The applications for condonation are, therefore, granted.

Issues

[25] Having already thus disposed of the preliminary issues regarding jurisdiction and condonation, we are required to determine the following in order to resolve this dispute:

(a) Does the Minister's decision to dismiss General Motau and Ms Mokoena constitute administrative or executive action?

(b) Has the Minister shown good cause for her decision to terminate the services of General Motau and Ms Mokoena, as required by section 8(c) of the Armscor Act?

(c) Was the Minister bound by any procedural constraints in exercising her section 8(c) power?

The distinction between administrative and executive action

[26] The Minister argues that the power to appoint and dismiss members of the Board is conferred especially on her for the effective pursuit of government business, particularly the national and territorial security of South Africa.25 She submits that her decision to terminate General Motau and Ms Mokoena's services constituted executive action as contemplated in the Constitution26 and is excluded from administrative-law scrutiny under PAJA.27 The respondents, on the other hand, argue that the Minister's section 8(c) power does not involve "policy considerations" but the implementation of the Armscor Act. They contend that the decision was administrative action as it meets the definitional requirements in PAJA.

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[27] Does the Minister's decision amount to administrative or executive action? Answering this question is important. If it amounts to administrative action, it is subject to a higher level of scrutiny in terms of PAJA. If it is executive action, it is subject to the less exacting constraints imposed by the principle of legality.[28] I undertake this enquiry in three stages. First, I consider the powers and functions provided for in section 85 of the Constitution and their relevance to PAJA. Second, I set out the means by which we should assess the nature of the power in question. Finally, I apply the principles that emerge from our jurisprudence to the facts of this case.

Section 85(2) of the Constitution and PAJA

[28] Section 85 of the Constitution, entitled "Executive authority of the Republic", reads:

> "(1) The executive authority of the Republic is vested in the President.
>
> (2) The President exercises the executive authority, together with the other members of the Cabinet, by –
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> (c) co-ordinating the functions of state departments and administrations;
>
> (d) preparing and initiating legislation; and
>
> (e) performing any other executive function provided for in the Constitution or in national legislation."

As is apparent from the scheme of Chapters 4 to 8 of the Constitution, the purpose of section 85(2) is to allocate functions to the executive arm of government – the National Executive in particular – just as the Constitution allocates functions to the Legislature and the Judiciary. The adjective "executive" thus indicates that the enumerated powers inhere in the President and the Cabinet rather than in Parliament or the Courts. The section selects the functionary to whom the powers are allocated, rather than determining the nature of the power. Put differently, the section should not be read as categorising all powers referred to in it as executive action, as opposed to administrative action, for the purpose of determining the appropriate standard of judicial review. That is not to say that section 85 of the Constitution is irrelevant in the administrative action enquiry, since it is referred to in PAJA.[29]

[29] PAJA gives content to the right to just administrative action in section 33 of the Constitution.[30] The Act categorises certain powers as administrative (through a rather complex taxonomy) and thereby determines the appropriate standard of review.[31] Among the powers excluded from this category and the Act's remit are:

> "the *executive powers or functions of the National Executive*, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), *85(2)(b), (c), (d) and (e)*, 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution".[32] (Emphasis added.)

[30] PAJA thus expressly excludes the "executive powers or functions of the National Executive" from administrative-law review. In addition to this general exclusion, the section lists particular executive powers that are excluded. This list includes those powers bestowed upon the National Executive in terms of section 85(2)(e) of the Constitution.

[31] The power to implement national legislation under section 85(2)(a) of the Constitution is, however, conspicuously absent from PAJA's list of excluded executive powers. The failure expressly to exclude the implementation of legislation by the National Executive was deliberate.[33] This Court has held that the implementation of legislation by a senior member of the Executive ordinarily constitutes administrative action.[34] Had PAJA excluded section 85(2)(a) from its reach, it would have excluded what has been described as the "core of administrative action" and may well have rendered PAJA inconsistent with section 33 of the Constitution.[35]

[32] Nevertheless, the fact that a functionary performs a certain act in terms of an empowering legislative provision does not, without more, mean that the functionary is implementing legislation. This is evident from the fact that section 85 contemplates a distinction between "implementing national legislation", under section 85(2)(a), and "performing any other executive function *provided for . . . in national legislation*", under section 85(2)(e).[36] As appears from a close reading of the provisions, the

distinguishing feature is the verb "implement" in section 85(2)(a), and the content of this distinction is discussed below.

Assessing the nature of a power

[33] The concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.[37] In the present matter there are two elements in dispute: whether the Minister's decision under section 8(c) of the Armscor Act is of an administrative nature (element (a)) and

whether it falls under any of the listed exclusions (element (g)). Both can be answered by interrogating the nature of the power.

[34] To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that enquiry. But the requirement has two important functions. First, it obliges courts to make a "positive decision in each case whether a particular exercise of public power . . . is of an administrative character".38 Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration.39

[35] As a starting point, in *New Clicks* Chaskalson CJ suggested that the definition of administrative action under PAJA must be "construed consistently" with the right to administrative justice in section 33 of the Constitution.40 As section 33 itself contains no express attempt to delimit the scope of "administrative action",41 it is helpful to have reference to jurisprudence regarding the interpretation of that section.

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[36] It is the function rather than the functionary that is important in assessing the nature of the action in question.42 The mere fact that a power is exercised by a member of the Executive is not in itself determinative. It is also true that the distinction between executive and administrative action is often not easily made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula.43

[37] Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another.44 By contrast, "[a]dministrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."45 Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example. The verb "implement", which also appears in section 85(2)(a) of the Constitution and distinguishes it from section 85(2)(e), may serve as a useful guide: administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation.

[38] In determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative.46 In *SARFU*, the Court was ultimately swayed by the fact that the President's power to appoint a commission of inquiry was closely related to his broad, policy-formulating function in concluding that it was an executive power. In the words of the Court:

> "[a] commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice."47

[39] As further assistance, a number of pointers can be extracted from previous decisions which are helpful in assessing the nature of a particular power. First, it may be useful to consider the source of the power. 48 Where a power flows directly from the Constitution, this could indicate that it is executive rather than administrative in nature, as administrative powers

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are ordinarily sourced in legislation.49 In *Masetlha*, Moseneke DCJ held that the President's power to dismiss the Director-General of the National Intelligence Agency was sourced in and flowed from section 209(2) of the Constitution.50 This was partly the basis for the conclusion that the power under consideration was an executive power as contemplated in section 85(2)(e) of the Constitution, despite the fact that section 209(2) had an analogue in national legislation.51

[40] Special care must, however, be exercised when reliance is placed on this factor. While administrative powers more commonly flow from legislation, PAJA's definition of administrative action expressly contemplates that the administrative power of organs of State may derive from a number of sources, including the Constitution.52 Conversely, and as borne out by section 85(2)(e) of the Constitution read with section 1(i)(aa) of PAJA, an executive power may be sourced in legislation. This feature of a power is thus only useful in this context, if at all, as a tentative signpost: constitutional powers are often wide-ranging and direction-giving, while statutory powers are generally more narrow and the concretisation of formulated policy.

[41] Second, the constraints imposed on the power should be considered. The fact that the scope of a functionary's power is closely circumscribed by legislation might be indicative of the fact that a power is administrative in nature. In *Ed-U-College*, this Court considered the nature of a Member of the Executive Council's power to determine a formula for the payment of subsidies to independent schools. It was persuaded thatthe power was administrative by, among other things, "the constraints upon [the] exercise [of the power]", as well as its relatively restricted scope.53

[42] Again, caution is required when reliance is placed on the absence of constraints or the level of discretion afforded to a functionary. This factor's utility is that, when a discretion is particularly broad, it suggests that the exercise of the power is akin to the formulation of policy. However, while the presence of a wide-ranging discretion is often indicative of a broad policy-making power, it may equally be an incident of the subject

matter on which it is brought to bear. A functionary may, for example, be afforded a considerable discretion in the exercise of a certain power simply because its exercise is heavily dependent on the factual circumstances

that obtain in a particular case.[54] Context is thus crucial in assessing the relevance of this factor.

[43] Third, it should be considered whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review. It may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject matter or policy matters for which courts should show the Executive a greater level of deference. Thus, this Court has found that administrative-law review is not appropriate where the power under consideration: is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate;[55] is based on considerations of comity or reciprocity between South Africa and foreign states, involving policy considerations regarding foreign affairs;[56] is closely related to the special relationship between the President and the Director-General of a security agency;[57] or involves the balancing of complex factors and sensitive subject matter relating to judicial independence.[58]

[44] In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers – the source of the power and the extent of the discretion afforded to the functionary – are ancillary in that they are often symptoms of these bigger questions.

Was the Minister's decision administrative or executive action?

[45] In order to determine the nature of the Minister's section 8(c) power, we must have regard to the legal framework imposed by the Armscor Act. The Minister's powers under the Act are fairly broad. For example, she

"exercises ownership control . . . on behalf of the State";[59] imposes such conditions on Armscor's interactions with foreign states "as may be necessary in the national interest";[60] appoints the non-executive members of the Board and designates the Chairperson and the Deputy Chairperson from their number;[61] is consulted by the Board in its selection of the CEO;[62] determines Armscor's share capital;[63] and approves the formation and disposal of subsidiaries.[64] She is also empowered to make regulations stipulating "conditions or restrictions subject to which the Board must manage and control the affairs of the Corporation".[65]

[46] The business of military procurement, on the other hand, is left to the Board. Thus, while it is Armscor's responsibility to see to the practical aspects of procuring defence matériel in order to meet the needs of the SANDF, the Minister is charged with the high-level supervision of the Corporation to ensure that it discharges its statutory mandate and operates in the national interest. This, in turn, must be understood in the context of the Minister's political responsibility and constitutional duty to see to the defence of the Republic, its territorial integrity and its people.[66]

[47] In the light of the aforegoing and for the reasons that follow, I am of the view that the Minister's decision is executive rather than administrative in nature. First, the Minister's section 8(c) power is an adjunct of her power to formulate defence policy.[67] In terms of this power, the Minister formulates policy on, among other things, the acquisition and maintenance of "air navigation systems"[68] and "arms, ammunition, vehicles, aircraft, vessels, uniforms, stores and other equipment".[69] Of course, this is policy in the broad sense: overarching and direction-giving, with the minutiae of individual procurement decisions left to Armscor.

[48] As is apparent from the scheme of the Armscor Act, the Minister does not provide direction through interventions in individual projects or by prescribing particular procurement policies. Rather, she discharges her political responsibility to ensure that the Department's procurement agency meets its statutory obligations by appointing and dismissing leaders who have the "knowledge and experience which . . . should enable them to attain the objectives of the Corporation".[70] The Minister must have in mind

the Department's policy aims when selecting Board members, including the Chairperson and Deputy Chairperson. She must select people who are capable of carrying out those aims and who share the Department's policy vision. Similarly, the Minister arrests the failure to follow proper policy by terminating the directorships of people who have not assisted Armscor to discharge its statutory functions.[71] The formulation of defence procurement policy and the appointment and dismissal of people who will supervise the implementation of that policy are thus closely linked.[72] While the appointment and dismissal of Board members is not the formulation of policy as such, it is the means by which the Minister gives direction in the vital area of military procurement, and is therefore an adjunct to her executive policy formulation function.

[49] Second, and relatedly, the exercise by the Minister of her section 8(c) power is not a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the State, which is the ordinary remit of administrative law.[73] Rather, it operates at a different level, for the section is a constitutive part of the Minister's power to supervise high-level public office-bearers in the performance of their official duties. She does so by means of the corporate relationship that she has with the Board members. They are the directors she has selected, in accordance with her policy dictates, to manage the Corporation –

and thereby determine defence procurement policy.

[50] Third, under the Armscor Act the Minister need only demonstrate good cause in order to justify the termination of the services of a Board member. She does not have to satisfy a list of jurisdictional requirements before she can take the decision, or need to demonstrate that a particular ground such as incapacity or misconduct exists. The Minister thus has a level of discretion in determining when directors should be removed, which points to the fact that her power under section 8(c) is executive in nature.74 The fact that the power is sourced in legislation is, as noted above, not in itself determinative, and thus does not dilute the force of the other considerations canvassed.

[51] For these reasons, I am persuaded that the impugned decisions are not subject to review under PAJA. Because section 8(c) of the Armscor Act is an adjunct of the Minister's power to make defence policy, and thus more

closely related to the formulation of policy than its application, the decision to terminate the services of Board members amounts to the performance of an executive function in terms of section 85(2)(e) of the Constitution, rather than the implementation of national legislation in terms of section 85(2)(a).

Compliance with the requirement of good cause

[52] The Minister submits that Armscor's failure to ensure that the SANDF was adequately equipped was a dereliction of its cardinal duty and was sufficient reason for her to have lost all trust in the Corporation's leadership. Armscor's failures under the leadership of General Motau and Ms Mokoena precipitated the breakdown in their relationship with the Minister and constituted the necessary good cause for the termination of their services in terms of section 8(c) of the Armscor Act. Accordingly, so the Minister argues, she acted lawfully.

[53] General Motau and Ms Mokoena contend that "the Minister's decision to dismiss them on all grounds stipulated in her letters of 8 August 2013 was arbitrary". Armscor agrees with this submission. The respondents assert that the Minister's decision does not withstand scrutiny because she cannot show that any of the Corporation's failures are solely or directly attributable to their leadership.

[54] Good cause may be defined as a substantial or "legally sufficient reason" for a choice made or action taken.75 Assessing whether there is good cause for a decision is a factual determination dependent upon the particular circumstances of the case at hand.76 It goes without saying that what constitutes good cause must be understood in the context of the Armscor Act as a whole, with a particular focus on the objectives and functions of Armscor and the important role played by the members of the Board.

[55] As set out above, Armscor is the SANDF's armament and technology procurement agency.77 Its objectives, as prescribed by the Armscor Act, are to meet the defence matériel, technology and research requirements of the Department effectively, efficiently and economically.78 In order to meet these objectives the Corporation must, *inter alia*, acquire and dispose of defence matériel as required by the Department;79 manage the

technology projects required by the Department;80 establish tender, contract-management and programme-management systems in relation to the acquisition of defence matériel and defence technology;81 "support and maintain such strategic and essential defence industrial capabilities, resources and technologies as may be identified by the Department";82 "manage facilities identified as strategic by the Department in a service level agreement";83 and "maintain such special capabilities and facilities as are regarded by the Corporation not to be commercially viable, but which may be required by the Department for security or strategic reasons."84 What is immediately apparent from this excursus is that Armscor does not interact with the Department as it might with any other player in the defence industry or a commercial third party. Rather, it procures at the instance of the Department and exists primarily to serve the military's defence matériel needs. The Department is in the driving seat. With this in mind, I am satisfied that the Minister advanced ample and cogent reasons to disclose good cause as required by section 8(c) of the Armscor Act.85

[56] First, in terms of section 5(1)(a) of the Armscor Act, the Corporation is obliged to enter into a service level agreement with the Department. The purpose of this service level agreement is to ensure that Armscor fulfils its core functions in an efficient and effective manner.86 The service level agreement must "specify measurable objectives and milestones";87 "specify a system to monitor the delivery of service";88 "provide for the maintenance of [Armscor's] capabilities over the long term";89 and "provide for the terms and conditions applicable to the service to be rendered by [Armscor]".90 Section 5(2) expressly imposes the obligation to conclude a service level agreement on the Board and the Department's accounting officer.

[57] A service level agreement was only concluded in the closing months of the 2012/13 financial year. At the time General Motau and Ms Mokoena approached the High Court, a service level agreement had still not been

concluded for the 2013/14 financial year. As the service level agreement is the means by which Armscor is able to supply the Department with defence matériel, the Corporation was unable for large parts of a two-year period to discharge its statutory mandate. And it would seem that the only reason for the ongoing delays was the Board's insistence that it be paid a 10% service commission, notwithstanding the fact that this was unaffordable for the Department and that the Corporation was funded by the National Treasury through

budgetary transfers from the Department.[91] Such intransigence in the face of the SANDF's ongoing procurement needs justifiably concerned the Minister.

[58] Second, the Board failed to complete a number of procurement projects efficiently and timeously. The Department prioritised the replacement of its parachute system and sought Armscor's assistance in this regard in 2010. Yet when General Motau and Ms Mokoena approached the High Court, a supplier had still not been engaged. The SANDF needed to replace its "absolute camping capability", and the necessary documentation was placed before the Board. However, at three separate meetings during 2011 and 2012 the Board failed, without reason, to consider the procurement proposal. Further delays were incurred when the Corporation decided on a "new approach" to the procurement of the camping equipment. Ultimately, the SANDF's operational requirements could not be met as a result of the 36-month delay occasioned by the Board's conduct.

[59] When the Department decided to acquire protection technology for the South African Air Force, the approval of the Board was required to undertake the contracting process with the preferred bidder. This approval was sought in November 2011, yet at the time of the hearing in the High Court it had neither been granted nor refused. From the record before us, it seems that to date, no decision has been made by the Board. These examples indicate Armscor's material and continuing failure to discharge its statutory mandate: the acquisition of defence matériel at the instance of the Department. Millions of Rand allocated to the Department were left wastefully unspent. Evidently Armscor was not operating in an effective, efficient or economic manner.

[60] From the above, it is perspicuous that Armscor was not discharging its statutorily prescribed mandate. The delays in question amounted to a failure to procure much-needed equipment in accordance with the Department's needs.

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[61] The Board is empowered to manage the affairs of Armscor.[92] It controls the decisions made and the actions taken by the Corporation. It follows that Armscor's widespread and systemic failures outlined above are attributable to the Board, which must account and ultimately take responsibility for its conduct. I am also compelled to point out that the non-executive members of the Board (General Motau and Ms Mokoena included) are highly skilled specialists who were appointed on account of their knowledge and experience, with a view to ensure that Armscor's affairs are properly and effectively managed.[93] As seasoned professionals in their field, they had to show diligence and professionalism. They are remunerated from the funds of Armscor[94] and are expected not only to act in the interests of the Corporation but also to ensure that the affairs of the Board are in order. There is no adequate explanation for the unsatisfactory state of affairs at Armscor. The Minister, therefore, had good cause to take action.

[62] But did she have good cause to single out General Motau and Ms Mokoena for removal? The respondents say no. Relying on the collective responsibility of the Board for the management of Armscor's affairs, they contend that the Minister acted unfairly in differentiating between the leadership of the Board, on the one hand, and the remaining members of the Board, on the other.

[63] I am constrained to disagree. First, as the directors appointed to lead the Board in the discharge of its duties, General Motau and Ms Mokoena must bear a special responsibility for its failures. They voluntarily acceded to the Minister's decision to appoint them as the leadership of the Board and must therefore take responsibility for its successes and failures. This conclusion seems inherent in the notion of leadership, and therefore axiomatic.

[64] During the High Court proceedings, the Minister sought to justify her conduct in part by reference to Armscor's failure to conclude a service level agreement with the Department. Despite admitting the crucial importance of this agreement, General Motau and Ms Mokoena's only response was that they had no knowledge of the 10% service charge. The Minister also drew attention to the delays and failures regarding the various procurement projects, and the consequent under-spending of millions

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of Rand by the Department. In response, General Motau and Ms Mokoena denied any knowledge of the details regarding these projects and refused to respond to the information contained in Mr Visser's affidavit on the basis that his report was "not disclosed in its entirety." There was – and remains – no denial of the delays, no explanation for the procurement failures, no justification for their ignorance of critical procurement projects and no attempt to show why they were not culpable for Armscor's dereliction of its statutory duty.

[65] This is not in any way undone by whatever statements the Minister made to the Board at a meeting following the dismissal of General Motau and Ms Mokoena, some of which may have been unclear and confusing.[95] Although her comment concerning Ms Mokoena[96] was ill-advised, it does not, without more, demonstrate that she acted with an ulterior motive. It must be recalled that at the same meeting the Minister reiterated the serious and sufficient reasons given in her letters to General Motau and Ms Mokoena for their dismissal. The statements, though unfortunate, do not disturb the conclusion that the Minister demonstrated good cause in exercising her section 8(c) power.

[66] Second, the Minister's response as to why she dismissed only General Motau and Ms Mokoena was resoundingly sound and logical. Had she dismissed the entire Board, she would have left Armscor, which has crucial obligations to fulfil, disabled and completely rudderless. The less invasive approach was to dismiss only the leadership of the Board, and to leave the Corporation with the necessary institutional knowledge to continue functioning. As the Minister explained to the Board on 14 August 2013, by allowing the directors other than General Motau and Ms Mokoena to retain their positions, she was attempting to ensure that Armscor had "the capacity, the know-how and the willingness . . . [to] bring solutions to urgent matters

affecting [the SANDF] and the [defence] industry."

[67] The Minister's choice not to dismiss the day-to-day management structure of Armscor (particularly the CEO and the CFO) can also not be impugned. It is the Board, headed by the Chairperson and the Deputy Chairperson, which has the principal obligation to manage and control Armscor.[97] Board approval was also required before key decisions could be made around the conclusion of the service level agreement and critical procurement projects.

[68] In conclusion, the Minister was not prompted to act by one or two poor managerial decisions, but by the continued failings of the Armscor Board under the leadership of General Motau and Ms Mokoena. Given this, the facts do not admit of any other conclusion but that the Minister had good cause to terminate their services.

Rationality

[69] General Motau and Ms Mokoena also contend that the Minister's decision falls to be set aside on the basis that it was "not rationally connected to the purpose she sought to achieve." I take the view that the Minister not only showed the necessary good cause required to dismiss General Motau and Ms Mokoena, but that her decision was also rational. The principle of legality requires that every exercise of public power, including every executive act, be rational.[98] For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given.[99] It is also well-established that the test for rationality is objective[100] and is distinct from that of reasonableness.[101]

[70] In the circumstances of this case, we are not required to determine whether the Minister's decision was the best decision she could have made, or whether she could have made a different decision. Rather, we are concerned with whether the Minister responded rationally to the indications of widespread dysfunction in Armscor, and whether her response was rationally connected to her executive oversight function.

[71] A rational link therefore exists between the need to address the failures of Armscor and the termination of the services of General Motau and Ms Mokoena: with them at the helm, the Corporation was not operating in an efficient or effective manner and was not properly fulfilling its statutorily prescribed mandate. Section 8(c) was properly used by the Minister, in the exercise of her executive oversight, to abate the problems that had set in at Armscor. Given this, I believe that the Minister's decision was rational.

Procedural constraints on the exercise of the Minister's section 8(c) power

[72] General Motau and Ms Mokoena contend that, should this Court find against them on the question whether the Minister's decision constituted administrative action, we should nevertheless conclude that the Minister had to comply with section 71(1) and (2) of the Companies Act[102] when

she exercised her power in terms of section 8(c) of the Armscor Act. It is not disputed by any of the parties that the Minister did not comply with those provisions. The Minister's answer is that she was not required to comply with them.

[73] Section 71 reads, in relevant part:

> "(1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).
>
> (2) Before the shareholders of a company may consider a resolution contemplated in subsection (1) –
>
> (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and
>
> (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote."

Section 71(1) and (2) is the mechanism under the Companies Act through which shareholders may dismiss a director whom they have elected. Importantly, section 71(2) requires that a shareholder must give a director notice and a chance to make representations before a resolution is adopted to dismiss him or her.

[74] In my view section 8(c) of the Armscor Act must be read together with section 71(1) and (2) of the Companies Act.[103] First, it is not disputed that Armscor falls within the definition of a "state-owned company" in terms of the Companies Act:[104] as required, it is listed in Schedule 2 of the Public Finance Management Act[105] as a "Major Public Entity" and it is registered under the Companies Act. Furthermore, section 9 of the Companies Act deals specifically with the statute's application to the affairs of

State-owned companies.[106] The effect of that provision is that State-owned companies are, for all intents and purposes, to be treated as public companies, unless a Cabinet member has procured an exemption (in whole or in part) from the obligation to comply with the Companies Act. It was conceded by Counsel for the Minister during the hearing that there is nothing before us to indicate that she has applied for an exemption. All indications point to Armscor's affairs being subject to that statute.

[75] Second, the Minister is, for the purpose of section 71(1) and (2), the shareholder of Armscor.[107] The Minister appoints the Chairperson and the Deputy Chairperson of the Board and is thus empowered through those provisions to terminate their services. She is thus required to comply with the prescripts of the section in dismissing them.

[76] Third, on my reading, section 8(c) of the Armscor Act and section 71(1) and (2) of the Companies Act are perfectly compatible: the former provides the substantive criterion, and the latter the process, by which Board members may be dismissed. Section 71(1) and (2) does not put any substantive constraint on the exercise of the Minister's dismissal power. Of course, it would be a different matter if the section obliged the Minister to dismiss a director for some other substantive reason (for example, ineligibility, incapacitation or negligence), notwithstanding the fact that she had

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good cause under the Armscor Act.[108] But it makes no such provision. Put simply, section 71 is the procedure by which the Minister exercises her section 8(c) power. I see nothing undesirable or unduly constraining in that.

[77] The Armscor Act is not designed, and does not purport, to regulate each aspect of Armscor's governance and corporate affairs. It seems clear, at least generally, that both the Armscor Act and the Companies Act apply – and must have been intended to apply – concurrently. Were that not the case, the Corporation would be operating without any statutory guidance over a wide range of areas.

[78] Fourth, the Minister's reliance on *Sasol v Lambert*[109] at the hearing as authority for the proposition that section 8(c) operates to the exclusion of section 71(1) and (2) is misplaced. In that case the Supreme Court of Appeal restated the *generalia specialibus non derogant* maxim: general words and rules do not derogate from special ones.[110] However, this maxim is only of application where a reading of the general statute could alter the meaning of the specific statute.[111] As explained above, that possibility does not arise here, for section 8(c) of the Armscor Act regulates the substantive basis upon which the Minister may terminate the services of a director and section 71(1) and (2) regulates the process the Minister must follow. And it must be noted that *Sasol v Lambert* emphasised that statutes, where possible, "must be read together".[112]

[79] It would not lead to an absurdity to hold that the Minister, as sole shareholder for these purposes, was obliged to comply with section 71(1) and (2) in the circumstances of this case. For the purpose of those provisions is not only to ensure that a majority of shareholders assent to a decision to dismiss a director, but also to ensure that those whose interests may materially be affected by the decisions taken are given an opportunity to put forward relevant information, and to ensure that the decision-makers are appropriately informed before taking a serious decision.

[80] The Minister took no steps required by the Companies Act when she exercised her section 8(c) power. She therefore failed to observe the prescribed procedure, and acted unlawfully, when she sought to terminate General Motau and Ms Mokoena's membership of the Board without first affording them a reasonable opportunity to make representations.

[81] Were it not for the operation of the Companies Act, would there be an obligation on the Minister to dismiss directors in a procedurally fair

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manner? This Court's decision in *Masetlha*, which was extensively relied on by the Minister in her submissions, has been interpreted to exclude the requirement of procedural fairness in the review of executive action as a stand-alone requirement under the principle of legality.[113] *Masetlha* does not stand for this unequivocal proposition, however. The decision was limited to the specific context of that case and the power under consideration: the distinguishing feature which rendered the observance of procedural fairness inapposite in that case was "the special legal relationship that obtains between the President as head of the National Executive, on the one hand, and the Director-General of an intelligence agency, on the other".[114] The sensitive nature of this special relationship, lying as it did in the heartland of "the effective pursuit of national security",[115] meant that Mr Masetlha, the spymaster-in-chief, could continue to occupy his position only as long as he enjoyed the trust of the President, his principal.[116] Moreover, the power to appoint and dismiss in *Masetlha* was "conferred specially upon the President for the effective business of government and . . . for the effective pursuit of national security."[117]

[82] This Court has also subsequently acknowledged in *Albutt*[118] that procedural fairness obligations may attach independently of a statutory obligation in virtue of the principle of legality. In that case, the President was required, as a matter of rationality, to allow some form of participation by interested persons when issuing pardons to prisoners under a special dispensation.[119]

[83] However, whether the principle of legality or some other principle in this case required the Minister to act in a procedurally fair manner, does not, in the light of the applicability of the Companies Act, need to be decided here. It suffices to note that our law has a long tradition – which was endorsed by this Court in *Mohamed* – of strongly entrenching *audi alteram partem* ("hear the other side"),[120] which attains particular force when

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prejudicial allegations are levelled against an individual. And it is for this reason that dismissal from service has been recognised as a decision that attracts the requirements of procedural fairness.[121]

Relief

[84] The Minister acted rationally and for good cause in terminating the services of General Motau and Ms Mokoena. However, she failed to follow proper procedure in terms of section 71(1) and (2) of the Companies Act. It follows that the Minister acted unlawfully in that regard. Does that mean that the High Court's order – setting aside the Minister's decision and confirming General Motau and Ms Mokoena as Board members – should be upheld?

[85] To grant appropriate relief, we must determine what is fair and just in the circumstances of a particular case.122 The various interests that might be affected by the remedy should be weighed up. This should at least be guided by the objective to address the wrong occasioned by the infringement; deter future violations; make an order which can be complied with; and which is fair to all those who might be affected by the relief.123 It also goes without saying that the nature of the infringement will provide guidance as to the appropriate relief.124 And the right to be heard has value both instrumental and intrinsic.125 One cannot excuse an unfair process because it led to the right result.126

[86] So the setting aside of the Minister's decision and the reinstatement of the aggrieved parties or an award of compensation would usually follow from a finding that a dismissal was procedurally defective and did not comply with the relevant legislative prescripts. But the very exceptional circumstances of this case mean that it would not be just and equitable for this Court to award such remedies here. A declaration is sufficient to address the flaws in the Minister's conduct, and to draw her attention to the importance of complying with the Companies Act and adopting a fair process in making such decisions. Limiting the relief to a declaration would, at the same time, vindicate the Minister's efforts to address the dereliction of duty by General Motau and Ms Mokoena.

[87] First, the Minister, on a number of occasions, had expressed her dissatisfaction with their conduct.127 The Minister convened three meetings with the Board to address various governance issues. None of these was attended by General Motau whilst Ms Mokoena failed to attend the last of the meetings.128 And General Motau's response to the Minister's letter in which she registered her disapproval of his non-attendance was insouciant, reminding her that Board members had other jobs and obligations. So General Motau and Ms Mokoena were certainly on notice of the Minister's dissatisfaction and her wish to reconstitute the Board.

[88] Second, General Motau and Ms Mokoena's terms of office came to an end in April 2014. The Court cannot reinstate them.

[89] Finally, despite the procedural defects of her decision, the Minister had substantively good, and indeed compelling, reasons for terminating the membership of General Motau and Ms Mokoena. As set out above, she had demonstrable good cause within the meaning of that term in the Armscor Act: the Corporation had, with General Motau and Ms Mokoena as its leadership, failed to discharge its mandate.129 In the proceedings before this Court the high-water mark of General Motau and Ms Mokoena's defence seems to be their ignorance of Armscor's parlous affairs, which is no defence at all.

[90] It is evident that the relationship between the Minister, on the one hand, and General Motau and Ms Mokoena, on the other, has disintegrated irreparably. The order of the High Court reinstating General Motau and Ms Mokoena must, therefore, be set aside.

Costs

[91] General Motau and Ms Mokoena were represented by Counsel appointed by this Court, who acted on their behalf *pro bono*. Their attorneys acted on the same basis. Although they were partly successful, this makes it

unnecessary to grant a costs order in their favour. I, therefore, make no order as to costs in this Court.

[92] Armscor approached the Court out of concern for the rights of Board members. This Court's finding that the Minister was required to comply with the procedure for the dismissal of directors in the Companies Act in dismissing General Motau and Ms Mokoena is some vindication of Armscor's position. However, given that the Corporation is itself an organ of State, no order as to costs is justified.130

[93] The order of the High Court with regard to costs cannot stand, however. There was no justification for the costs order on an attorney-and-own client scale made against the Minister.131 The reasons relied on by the High Court disclose no basis for a punitive and exceptional costs order.132 I, therefore, replace this order with an order for costs in favour of General Motau and Ms Mokoena on a party-party scale. Armscor was not involved in the High Court proceedings, and thus no costs order need be made in its favour insofar as those proceedings are concerned.

Order

[94] In the result, the following order is made:

1. Condonation for the late filing of the written submissions of both General Motau and Ms Mokoena, and of the Armaments Corporation of South Africa (SOC) Limited ("Armscor"), is granted.
2. The appeal is upheld to the extent set out below.
3. The order of the High Court is set aside and replaced with the following:

"(a) It is declared that the Minister acted unlawfully insofar as she terminated the services of General

Motau and Ms Mokoena on the Armscor Board without following the procedure set out in section 71(1) and (2) of the Companies Act.

(b) The Minister's decision to terminate the services of General Motau and Ms Mokoena on the Armscor Board is not set aside.

(c) The Minister is ordered to pay the costs incurred by General Motau and Ms Mokoena in the High Court."

4. There is no order as to costs in this Court.

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(Moseneke ACJ, Skweyiya ADCJ, Cameron, Froneman, Van der Westhuizen JJ, Dambuza and Majiedt AJJ concurred in the judgment of Khampepe J.)

Jafta J:

[95] I have read the judgment prepared by my Colleague Khampepe J ("main judgment"). But I do not agree with the outcome proposed and the reasons supporting it. In my view, the narrow question raised in this matter is whether the Minister's termination of the first and second respondents' membership of the Armscor Board violated their procedural fairness rights. If it did, then the High Court was right to set the termination aside.

[96] The factual background is set out in detail in the main judgment and it is not necessary to repeat it here, save to mention the facts essential to a proper understanding of this judgment. The first and second respondents were Chairperson and Deputy Chairperson of the Armscor Board. Their membership was terminated[133] without any pre-decision hearing by the Minister on 8 August 2013. The respondents were notified of the Minister's decision in letters of the same date.

[97] The main reason for the termination was that the Minister was unhappy with the Board's performances of its functions. In the letter, the Minister listed a number of instances in respect of which the Board had failed to perform to her expectations. The Board's primary function is to procure equipment and other matériel for the South African National Defence Force. The Minister was concerned that the Board's inaction, under the leadership of the respondents, was prejudicial to the Defence Force and had put its members at risk. Their non-performance was, in the opinion of the Minister, sufficient cause to terminate the respondents' membership.

[98] Discontent with the Minister's decision, the respondents took it on review to the High Court. Apart from disputing the non-performance relied on by the Minister, the respondents contended that the decision was procedurally unfair. In opposing the review, the Minister argued that her decision did not constitute administrative action and therefore was not subject to the procedural fairness requirements in PAJA. This is how the need to classify the decision arose.

[99] It is common cause that the respondents were not afforded a hearing before the Minister terminated their membership. What is in dispute instead is whether the respondents were entitled to a hearing before the decision was taken. If so, whether the right to be heard was located in section 33 of the Constitution,[134] as given effect to by PAJA.[135]

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[100] The High Court was persuaded that the impugned decision amounted to administrative action and set it aside because of, among other grounds, the fact that it was procedurally unfair. The unfairness arose from the fact that the respondents were denied a pre-decision hearing.

[101] Although the main judgment agrees that the respondents were entitled to a pre-decision hearing, it, however, locates their right in section 71 of the Companies Act. This finding is prompted by the conclusion that the Minister's decision constitutes executive action. I disagree.

[102] The main judgment relies on three considerations for the conclusion that the Minister's decision was executive action. The first is that the power exercised by the Minister "is an adjunct of her power to formulate defence policy".[136] The second is that the Minister did not exercise "a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state".[137] The third is that, in order to terminate membership of the Board, "the Minister need only demonstrate good cause".[138]

[103] Before examining each of these considerations, it is necessary to outline the process followed in determining whether a particular decision constitutes administrative or executive action. First, there is no standard established or test laid down for this enquiry. The determination is made on a case-by-case basis.[139] It is a difficult enquiry and, as the main judgment observes, caution must be exercised when determining whether an act is executive and not administrative. This is so because, if it is executive, it cannot be subjected to the review scrutiny in section 33 of the Constitution and PAJA. This means that those who are adversely affected by an executive act cannot invoke any of the administrative justice rights conferred by section 33 to challenge the validity of the executive act.

[104] This is because section 33 and PAJA do not apply to executive acts. PAJA defines an administrative act as a decision taken by an organ of State, when exercising a public power in terms of the Constitution or performing a public function in terms of legislation. The decision must also have direct external effect. More importantly, for present purposes, the decision must not arise from the exercise of the executive powers contained in certain sections of the Constitution, as listed in PAJA. Notably, in those exclusions, the power in section 85(2)(a) is left out.[140]

[105] Therefore, as I see it, for any decision to be reviewed as an administrative act, it must constitute an administrative act as defined in PAJA. That act does not include executive acts expressly excluded by the

definition section in PAJA. In respect of the National Executive, to which the Minister belongs, the executive powers and functions excluded from the scope of

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administrative action are those in sections 79(1) and (4); 84(2), leaving out (e) and (j); 85(2), excluding (a); 91; 92(3); 93; 97; 98; 99; and 100 of the Constitution.[141]

[106] By leaving out the powers in section 84(2)(e) and (j) from the list of exclusions, PAJA suggests that appointments made by the President in terms of the Constitution, when not acting in his capacity as head of the National Executive, constitute administrative decisions and so is his or her decision to pardon offenders and remit penalties. The same applies to decisions taken in terms of section 85(2)(a).[142] In terms of PAJA, read with section 85(2)(a) of the Constitution, implementation of national legislation, like the Armscor Act, amounts to administrative action unless the Constitution or an Act of Parliament provides otherwise. Therefore, ordinarily, the implementation of legislation constitutes administrative action, except where there is a clear indication that it does not.

[107] It cannot be gainsaid that what we are concerned with here is the implementation of the Armscor Act. To be precise, we are dealing with the exercise of power by the Minister in terms of which the respondents' membership of the Board was terminated. The Minister does not derive this power from the Constitution. Instead, it is a power conferred on her by section 8(c) of the Armscor Act. The section provides:

> "A member of the Board must vacate office if –
>
> . . .
>
> (c) his or her services are terminated by the Minister on good cause shown."

[108] The exercise of the power to terminate membership of the Board is subject to one condition. The Minister may terminate the membership of any Board member if the Minister has a good cause to do so. Put differently, good cause triggers and justifies the exercise of that power by the Minister. In exercising the power, the Minister implements the Armscor Act and her decision would, ordinarily, amount to administrative action unless the Armscor Act indicates otherwise.

[109] In *Metcash Trading*,[143] this Court confirmed that the exercise of a statutory power constitutes implementation of legislation and that such action is administrative action, contemplated in section 33 of the Constitution. There it was stated:

> "The Commissioner, in exercising the power under section 36, is clearly implementing legislation and as such the exercise of the section 36 power constitutes administrative action and falls within the administrative justice clause

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> of the Constitution. I cannot agree with Snyders J to the extent that she considered the exercise of the discretion conferred upon the Commissioner in section 36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay. It contemplates, therefore that notwithstanding the 'pay now, argue later' rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute 'just administrative action' as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action."[144]

[110] The question that arises is whether the Armscor Act provides clearly that the implementation of legislation here does not amount to administrative action. The Armscor Act is a short statute, comprising five chapters and 24 sections. Chapter one is devoted to the establishment of the Armaments Corporation of South Africa (SOC) Limited ("Corporation") and also sets out its objectives, powers and functions. Chapter two deals with the Board of Directors, including the appointment of directors by the Minister, powers and functions of the Board, as well as their removal from office. Section 8, in terms of which the Minister terminated the respondents' membership, is located in this chapter.

[111] Chapter three, which is one of the shorter chapters, deals with the financial and audit affairs of the Corporation. The shortest chapter is chapter four. It consists of two sections only, one of which empowers the Minister to make regulations. This chapter also empowers the Board to delegate any of its powers to its officials. Chapter five contains miscellaneous provisions on safeguarding records and the property of the Corporation, including intellectual property, formation of subsidiaries to the Corporation and the repeal of laws.

[112] A reading of the entire Armscor Act shows that none of its provisions explicitly provides that its implementation does not constitute administrative action. What needs to be determined is whether, by implication, the Act provides that its implementation amounts to executive action. This enquiry requires us to examine the entire Act for factors indicating that the exercise of the power in section 8(c) constitutes an executive act.

[113] The difficulty in making a determination here normally arises if there is some overlap in executive powers giving rise to administrative action and those which do not, for example, the power in terms of which legislation is implemented and the power in terms of which policy is formulated. Thus, in *SARFU*, this Court remarked:

> "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a

> particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."145 (Footnotes omitted.)

[114] Ordinarily the formulation of policy in broad terms does not amount to administrative action. This is because the power to develop and implement national policy in section 85(2)(b) of the Constitution is one of the exclusions in the definition section of PAJA. The exercise of that executive power is not an administrative act. However, the emphasis is usually placed on the formulation part of the power and not on implementation. Once a policy has been formulated and translated into legislation, its implementation would ordinarily constitute an administrative act.

[115] Engaged in the determination of whether the exercise of public power amounted to an administrative or executive action, our courts have drawn a bright line between formulation of policy, on the one hand, and, on the other, its implementation. In *Ed-U-College*, this Court drew the distinction in these terms:

> "It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. *The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action*."146 (Emphasis added.)

[116] The same approach was adopted by the Supreme Court of Appeal in *Grey's Marine Hout Bay*:

> "There will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect – but the execution of policy is not equivalent to its formulation. The decision in the present case was not one of policy formulation but of execution."147

[117] If the exercise of power results in the formulation of policy, this is a strong factor which supports the view that the act arising from that exercise is an executive one. But this is not always a decisive factor, as this Court observed in *Ed-U-College*.148 In that case, this Court was confronted with the question whether the adoption of a subsidy formula by the MEC and the allocation of subsidies in terms of that formula constituted administrative action or formulation of policy. There, like here, the power exercised was contained in an Act of Parliament. This Court held that the exercise of the power involved formulation of policy in the narrow sense but, despite that, the Court reached the conclusion that the exercise of power constituted administrative action.

[118] In *Ed-U-College*, the Court explained the distinction between wide and narrow policy formulation thus:

> "In the present case, section 48(2) of the Schools Act empowers the MEC to grant subsidies to independent schools from money allocated for that purpose by the Legislature. Clearly, therefore, unless money is allocated by the Legislature for this purpose, no subsidy may be granted. The principle of subsidy allocation to independent schools is determined in the first instance by the Legislature. Once it has allocated money for independent schools, the MEC is then empowered to determine the manner of how it is to be spent. Although there are a range of ways in which this power can be exercised, it must always be exercised within the constraints of the budget set by the Legislature. Furthermore, it is not a power which the Legislature would be suited to exercise. The determination of which schools should be afforded subsidies and the allocation of such subsidies are primarily administrative tasks. The determination of the precise criteria or formulae for the grant of subsidies does contain an aspect of policy formulation but it is policy formulation in a narrow rather than a broad sense. *The decision apparently constitutes a broad policy decision because it purports to determine how the allocated budget is to be distributed and not the amount to be given to each school. However, on closer scrutiny it is in fact not so broad because the MEC determines not only the formula but also in effect the specific allocations to each school*. This case may be close to the borderline. *However, I am persuaded that the source of the power, being the Legislature, the constraints upon its exercise and its scope point to the conclusion that the exercise of the section 48(2) power constitutes administrative action, not the formulation of policy in the broad sense as suggested by the applicants*."149 (Emphasis added.)

[119] It is now convenient to examine section 8(c) of the Armscor Act, to determine whether it confers power for formulating policy or implementing the Act. As mentioned earlier, the power in the section is for the termination of Board membership. When exercising it, the Minister does not formulate any policy. Nor does she set out to collect information which may help her to formulate policy. But she does so for a proper implementation of the Armscor Act. The good cause that triggers the exercise of the power must be something done by a Board member that is not in line with the objects of the Armscor Act or the Corporation itself.

[120] On the approach adopted by the Court in *Ed-U-College* and having noted that the source of the power is the Armscor Act, the question is whether the scope of and constraints for the exercise of the section 8(c) power

shed some light on whether its exercise amounts to administrative action. The scope of the power is limited to terminating membership of the Board. The constraint for its exercise is the presence of good cause to terminate that membership. Just like in *Ed-U-College*, these factors show that the exercise of the power constitutes administrative action, and not the formulation of the defence policy. Moreover, here unlike in *Ed-U-College*, we are not dealing with a borderline case. It is not a case of formulation of policy, even in the narrow sense.

[121] However, the main judgment holds that "the Minister's section 8(c) power is an adjunct of her power to formulate defence policy". For this finding, reliance is placed on *SARFU*. I disagree. First, the termination of the Board's membership is not supplementary to the Minister's power, if she has the power to formulate defence policy. The position here is different from *SARFU* where the establishment of a commission was taken to be a mechanism in terms of which information could be collected and advice given. These could help the President to formulate policy. It was in this context that in *SARFU*, this Court said the commission itself was an adjunct to the policy formulation function. The Court stated:

> "A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action within the meaning of section 33. It should, however, be emphasised again, that this conclusion relates to the appointment of the commission of inquiry only. The conduct of the commission, particularly one endowed with powers of compulsion, is a different matter."150

[122] It is apparent from this statement that the Court was influenced by two considerations in concluding that the appointment of the commission of inquiry did not constitute administrative action. The first consideration was that the commission would facilitate the procurement of information and advice which could help the President in performing the function of formulating policy. The second consideration was that, when appointing the commission, the President was not implementing legislation but was exercising an original constitutional power vested in him as head of state and not as head of the Executive. The Court distinguished between implementation of legislation and the performance of functions which are essentially political.

[123] The present is not such a case.

[124] The second consideration relied on in the main judgment is that "the exercise by the Minister of her section 8(c) power is not a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state". It is asserted that the section operates at a different level and empowers the Minister to perform her oversight responsibilities and supervise "high-level public office-bearers in the performance of their official duties". As I read it, there is an inconsistency in this consideration. On the one hand, it says that the exercise of the power does not involve the implementation of policy in the daily functions of the state, and on the other, it says that the section empowers the Minister to supervise public office-bearers in the performance of their duties.

[125] But the inconsistency aside, the level at which the Minister operates is not material to the enquiry because even the President has responsibilities that are administrative and others that are executive. As was observed in *SARFU*, some responsibilities of the President and Ministers may amount to administrative action and others not. In *SARFU*, the Court proclaimed:

> "As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of section 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of section 33. It follows that some acts of members of the Executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated by section 33, but not all acts by such members will do so."151 (Footnote omitted.)

[126] The last consideration on which the main judgment relies is that the Minister has a discretion to terminate membership of any Board member on the basis of a good cause. In my view, the vesting of a discretion in the Minister does not indicate that the function is executive rather than administrative. Indeed, the conferment of a discretion is the hallmark of most administrative functions. In *Dawood*,152 this Court affirmed the importance of discretionary powers in administrative decisions. There it was said:

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is

> possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here."153 (Footnote omitted.)

[127] I conclude that the Minister's termination of the respondents' membership of the Board constituted administrative action envisaged in section 33 of the Constitution. Consequently, her decision is reviewable under PAJA. Since the respondents were not given a hearing before that decision was taken, it was

procedurally unfair and the High Court was right to set it aside.

[128] In the view I take of the matter, it is not necessary to determine whether section 71 of the Companies Act finds application in this matter. It is also unnecessary to decide whether the termination of the respondents' membership was based on a good cause.

[129] For all these reasons, I would dismiss the appeal.

(Madlanga and Zondo JJ concurred in the judgment of Jafta J.)

For the appellant:

M Erasmus SC and *M Kgatla* instructed by the *State Attorney*

For the first and second respondents:

M Dewrance and *N Muvangua* instructed by *Mkhabela Huntley Adekeye Attorneys*

For the third respondent:

O Mooki instructed by *Hogan Lovells Attorneys*

The following cases were referred to in the above judgment:

South Africa

Administrator, Natal and another v Sibiya and another [1992] 2 All SA 442 ([1992] ZASCA 115; 1992 (4) SA 532) (A) – **Referred to** 957

Administrator, Transvaal and others v Zenzile and others [1991] 1 All SA 240 ([1990] ZASCA 108; 1991 (1) SA 21) (A) – **Referred to** 957

Affordable Medicines Trust and others v Minister of Health and others 2005 (6) BCLR 529 ([2005] ZACC 3; 2006 (3) SA 247) (CC) – **Referred to** 952

Albutt v Centre for the Study of Violence and Reconciliation and others 2010 (5) BCLR 391 ([2010] ZACC 4; 2010 (3) SA 293) (CC) – **Referred to** 956

Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others 2014 (1) BCLR 1 ([2013] ZACC 42; 2014 (1) SA 604) (CC) – **Referred to** 957

Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and others 2013 (7) BCLR 762 ([2013] ZACC 13) (CC) – ***Dictum* at paras [40]–[42] applied** 940

Brummer v Gorfil Brothers Investments (Pty) Ltd and others 2000 (5) BCLR 465 ([2000] ZACC 3; 2000 (2) SA 837) (CC) – **Referred to** 938

Chirwa v Transnet Ltd and others 2008 (3) BCLR 251 ([2007] ZACC 23; 2008 (4) SA 367) (CC) – ***Dictum* at paras [181] applied** 941

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others 2010 (9) BCLR 859 ([2010] ZACC 11; 2010 (6) SA 182) (CC) – **Referred to** 959

Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others 2000 (8) BCLR 837 ([2000] ZACC 8; 2000 (3) SA 936) (CC) – **Referred to** 944

Democratic Alliance v President of the Republic of South Africa and others 2012 (12) BCLR 1297 ([2012] ZACC 24; 2013 (1) SA 248) (CC) – **Referred to** 952

eThekwini Municipality v Ingonyama Trust 2013 (5) BCLR 497 ([2013] ZACC 7; 2014 (3) SA 240) (CC) – **Referred to** 938

Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others 1998 (12) BCLR 1458 ([1998] ZACC 17; 1999 (1) SA 374) (CC) – **Referred to** 944

Fose v Minister of Safety and Security 1997 (7) BCLR 851 ([1997] ZACC 6; 1997 (3) SA 786) (CC) – **Referred to** 957

Geuking v President of the Republic of South Africa and others 2004 (9) BCLR 895 ([2002] ZACC 29; 2003 (3) SA 34) (CC) – ***Dictum* at para [26] applied** 940

Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others [2005] 3 All SA 33 ([2005] ZASCA 43; 2005 (6) SA 313) (SCA) – ***Dictum* at para [21] approved** 941

Hoffmann v South African Airways 2000 (11) BCLR 1211 ([2000] ZACC 17; 2001 (1) SA 1) (CC) – **Referred to** 957

Kent NO v South African Railways and another 1946 AD 398 – **Referred to** 955

Masetlha v President of the Republic of South Africa and another 2008 (1) BCLR 1 ([2007] ZACC 20; 2008 (1) SA 566) (CC) – **Referred to** 943

Metcash Trading Limited v Commissioner for the South African Revenue Service and another 2001 (1) BCLR 1 ([2000] ZACC 21; 2001 (1) SA 1109) (CC) – **Referred to** 962

Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae) 2006 (8) BCLR 872 ([2005] ZACC 14; 2006 (2) SA 311) (CC) – **Referred to** 940

Page 970 – 2014 (8) BCLR 930 (CC)

Motau and another v Minister of Defence and Military Veterans and another, unreported, case number 51258/13, 18 September 2013 – **Reversed on appeal** 932

National Director of Public Prosecutions and another v Mohamed NO and others 2003 (5) BCLR 476 ([2003] ZACC 4; 2003 (4) SA 1) (CC) – **Referred to** 956

National Lotteries Board and others v South African Education and Environment Project and another [2012] 1 All SA 451 ([2011] ZASCA 154; 2012 (4) SA 504) (SCA) – **Referred to** 948

Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2013 (1) BCLR 14 ([2012] ZACC 27; 2012 (6) SA 588) (CC) – **Referred to** 938

Permanent Secretary, Department of Education and Welfare, Eastern Cape and another v Ed-U-College (PE) (Section 21) Inc 2001 (2) BCLR 118 ([2000] ZACC 23; 2001 (2) SA 1) (CC) – **Referred to** 940

Pharmaceutical Manufacturers Association of South Africa and another: In re: Ex parte President of the Republic of South Africa and others 2000 (3) BCLR 241 ([2000] ZACC 1; 2000 (2) SA 674) (CC) – **Referred to** 952

President of the Republic of South Africa and others v South African Rugby Football Union and others 1999 (10) BCLR 1059 ([1999] ZACC 11; 2000 (1) SA 1) (CC) – ***Dictum* at paras [148] applied** 939

R v Ngwevela [1954] 1 All SA 286 (1954 (1) SA 123) (A) – **Referred to** 956

Sasol Synthetic Fuels (Pty) Ltd and others v Lambert and others [2002] JOL 9264 ([2001] ZASCA 133; 2002 (2) SA 21) (SCA) – **Referred to** 955

Shilubana and others v Nwamitwa 2008 (9) BCLR 914 ([2008] ZACC 9; 2009 (2) SA 66) (CC) – **Referred to** 938

Sokhela and others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and others [2009] JOL 23782 ([2009] ZAKZPHC 30; 2010 (5) SA 574) (KZP) – ***Dictum* at paras [60] approved** 941

South African National Defence Union v Minister of Defence and others 2007 (8) BCLR 863 ([2007] ZACC 10; 2007 (5) SA 400) (CC) – ***Dictum* at paras [52] applied** 939

Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority and others 2007 (4) BCLR 339 ([2006] ZACC 23; 2007 (4) SA 395) (CC) – **Referred to** 947

United Kingdom

John v Rees [1970] Ch 345 – **Referred to** 957

Footnotes

1 *Motau and another v Minister of Defence and Military Veterans and another*, case number 51258/13, 18 September 2013 ("High Court judgment").

2 The first respondent is referred to as "Lieutenant General (Retired) Maomela Motau" in the first and second respondents' papers in the High Court. I simply refer to him as "General Motau" in this judgment.

3 Armaments Corporation of South Africa Limited Act 51 of 2003 ("Armscor Act"). Armscor was established in terms of s 2(1) of the Armaments Development and Production Act 57 of 1968. In terms of s 3(1) of that Act, the corporation's object was "to meet as effectively and economically as may be feasible the armaments requirements of the Republic, including armaments required for export". S 23 of the Armscor Act, read with the Schedule of the Act, repealed the Armaments Development and Production Act. However, s 2 of the Armscor Act provides for the "Continued existence of Corporation", and reads in relevant part:

"(1) [Armscor] established by section 2 of the Armaments Development and Production Act continues to exist under that name despite the repeal of that Act.

. . .
(3) The Corporation is a juristic person capable of suing and being sued in its own name.
(4) Subject to this Act, the Corporation may –
(a) purchase or otherwise acquire, hold or alienate property, movable or immovable; and
(b) perform such acts as are necessary for or incidental to the carrying out of its objectives and the performance of its functions."

4 S 2(2) of the Armscor Act reads as follows:
"(a) The State remains the sole shareholder of the Corporation.
(b) The Minister exercises ownership control over the Corporation on behalf of the State."
5 Defined in s 1(g) of the Armscor Act as "defence matériel".
6 These objectives are set out in s 3(1) of the Armscor Act.
7 See s 4(2) of the Armscor Act.
8 S 6(1) of the Armscor Act. The High Court judgment erroneously states that the Armscor Act requires two further Board members: the Secretary of Defence and the Chief of the South African National Defence Force. The provision stipulating this requirement – s 6(1)(c) of the Armscor Act – was repealed with effect from May 2006.
9 According to the Minister, in a speech made at a meeting with the Board on 14 August 2013, delays in the procurement of defence matériel "had a direct impact on deployed troops around the continent" and in particular on troops deployed in the Democratic Republic of Congo.
10 The Project, which related to the acquisition of protection technology for the South African Air Force and "deployed elements", had not progressed since Armscor had made a submission to the Board on its preferred bidder in November 2011. After a work session convened between Armscor and the Department's Defence Matériel Division on 18 June 2013, Armscor and the Department "agreed to disagree" on the way forward. It was thus decided that the matter would be submitted to the Secretary of Defence and the Chairperson of the Board to seek ministerial intervention so that Armscor and the Department could come to a mutually acceptable agreement.
11 The Minister does not elaborate on the breakdown of this relationship in her letter. However, from her subsequent meeting with the Board on 14 August 2013, it seems that the breakdown related to a range of disputes and matters of contention between Armscor and various stakeholders in the defence industry, including the Department, the South African Aerospace Maritime and Defence Industries Association, Denel and "organised labour". Most of these disputes apparently emanated from the "provisions contained in the draft Armscor business strategy".
12 S 4(2)(k) reads:
"[Armscor] must provide marketing support to defence-related industries in respect of defence matériel, in consultation with the Department and the defence-related industries in question."
13 3 of 2000.
14 S 6(2)(d) of PAJA allows a court to review an administrative decision if it was "materially influenced by an error of law".
15 S 3(1) of PAJA requires that administrative action be procedurally fair. S 6(2)(c) in turn provides that administrative action may be reviewed if it is procedurally unfair.
16 S 6(2)(e)(ii) of PAJA allows administrative action to be reviewed if it "was taken for an ulterior purpose or motive".
17 This finding was based on the High Court's consideration of the minutes of a meeting held between the Minister and the remaining members of the Board following her termination of the services of General Motau and Ms Mokoena. See [15] above.
18 S 6(2)(f) of PAJA provides that an administrative decision may be reviewed if it was not rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator.
19 High Court judgment above fn 1 at paras [72]–[73].
20 See [15] above.
21 After no notice of opposition or submissions were received from General Motau and Ms Mokoena, a letter was directed to the Chairperson of the Pretoria Society of Advocates requesting that it appoint one of its members to assist the Court by making submissions on their behalf. The matter was then referred to the Johannesburg Bar Society for their assistance.
22 See *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2014 (3) SA 240 (CC); 2013 (5) BCLR 497 (CC) at paras [24]–[25], relying on *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC).
23 *Shilubana and others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) at para [8].
24 See in this regard *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at paras [16]–[19].
25 The Minister is the member of Cabinet responsible for the defence of South Africa (see s 201(1) of the Constitution read with the definition of "Minister" in s 1 of the Defence Act 42 of 2002). She notes that, in terms of s 200(2) of the Constitution, the primary object of the SANDF "is to defend and protect [South Africa], its territorial integrity and its people in accordance with the provisions of the Constitution and the principles of international law regulating the use of force."
26 S 85(2)(e).
27 By virtue of the exclusion in s 1(i)(aa) of the definition of "administrative action" in PAJA.
28 *President of the Republic of South Africa and others v South African Rugby Football Union and others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) at para [148]. The correct order of enquiry is to consider, first, whether PAJA applies, and only if it does not, what is demanded by general constitutional principles such as the rule of law. As noted by O'Regan J in *South African National Defence Union v Minister of Defence and others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) at para [52], "a litigant who seeks to assert [a constitutional right] should in the first place base his or her case on any legislation enacted to regulate the right, not [the Constitution]."
29 See s 1(i)(aa) of PAJA, which is discussed immediately below.
30 S 33 is quoted in relevant part at fn 41 below.
31 This is done through the definition of "administrative action", which is set out in more detail at [33] below.
32 S 1(i)(aa) of PAJA.
33 Chaskalson CJ in *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (*New Clicks*) at para [126]. See also the judgment of Ngcobo J at para [461].
34 *Permanent Secretary, Department of Education and Welfare, Eastern Cape and another v Ed-U-College (PE) (Section 21) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) (*Ed-U-College*) at para [18] and *SARFU* above fn 28 at para [142].
35 Chaskalson CJ in *New Clicks* above fn 33 at para [126].
36 Emphasis added. This is also apparent from the decisions of this Court. See, for example, *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and others* [2013] ZACC 13; 2013 (7) BCLR

762 (CC) (*ARMSA*) at paras [40]–[42] and *Geuking v President of the Republic of South Africa and others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) at para [26] where, notwithstanding the fact that a power derived from legislation, it was considered executive in nature.

37 *Chirwa v Transnet Ltd and others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para [181] (*per* Langa CJ); *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) (*Grey's Marine*) at para [21] [also reported at [2005] 3 All SA 33 (SCA) – Ed]; and *Sokhela and others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and others* [2009] ZAKZPHC 30; 2010 (5) SA 574 (KZP) (*Sokhela*) at para [60] [also reported at [2009] JOL 23782 (KZP) – Ed]. See also Hoexter *Administrative Law in South Africa* (2ed) (Juta & Co Ltd, Cape Town 2012) at 197.

38 *Sokhela id* at para [61]. See also *ARMSA* above fn 36 at para [41].

39 *Id*.

40 *New Clicks* above fn 33 at paras [100] and [128]. See also para [466] (*per* Ngcobo J) and *Grey's Marine* above fn 37 at para [22].

41 S 33 of the Constitution provides in relevant part:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

It is apparent that, while using the term "administrative action", the section makes no positive attempt to define the term's scope.

42 *SARFU* above fn 28 at para [141].

43 *Id* at para [143].

44 See *Ed-U-College* above fn 34 at para [18] and *SARFU* above fn 28 at para [142].

45 *Grey's Marine* above fn 37 at para [24]. See also *ARMSA* above fn 36 at para [43].

46 *SARFU* above fn 28 at para [142].

47 *Id* at para [147].

48 *Id* at para [143].

49 *Ed-U-College* above fn 34 at para [21].

50 *Masetlha v President of the Republic of South Africa and another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras [65] and [69]–[70].

51 *Id* at paras [69] and [75]–[76].

52 S 1(i)(a)(i) of PAJA.

53 *Ed-U-College* above fn 34 at para [21].

54 For example, in terms of s 36(1) of the Cape Land Use Planning Ordinance 15 of 1985, planning officials may approve and refuse land-use applications purely on the basis of whether they consider the particular development to be "desirable". This requirement imports a large degree of discretion in the evaluation of land-use applications, but it cannot seriously be contended that the taking of decisions in relation to such applications constitutes anything other than administrative action. See also *Dawood and another v Minister of Home Affairs and others*; *Shalabi and another v Minister of Home Affairs and others*; *Thomas and another v Minister of Home Affairs and others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*). As noted by O'Regan J at para [53], a broad discretionary power may equally be conferred "where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance", where the relevant factors are "indisputably clear" or "where the decision-maker is possessed of expertise relevant to the decisions to be made."

55 *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras [41] and [45].

56 *Geuking* above fn 36 at paras [26]–[27].

57 *Masetlha* above fn 50 at paras [77] and [86].

58 *ARMSA* above fn 36 at paras [43]–[45].

59 S 2(2)(b) of the Armscor Act.

60 *Id* s 4(3)(b).

61 *Id* s 7(1) and (2).

62 *Id* s 10(1).

63 *Id* s 15(1)(a).

64 *Id* s 21.

65 *Id* s 18(1)(b).

66 S 201(1) read with s 200(2) of the Constitution.

67 Regarding the inclusion of policy formulation and adjuncts thereto within the notion of "executive action", see *SARFU* above fn 28 at para [147].

68 S 80(2)(b) of the Defence Act.

69 *Id* s 80(2)(c).

70 S 7(1) of the Armscor Act.

71 As noted in *Masetlha* above fn 50 at para [77], the power to dismiss is "a corollary of the power to appoint".

72 Compare *Sokhela* above fn 37 at para [76]. Similar reasoning is contained in the judgment of the KwaZulu-Natal High Court, Pietermaritzburg, in relation to the appointment of board members to a statutory body. That Court concluded, however, that the power to suspend and terminate the services of certain board members on the grounds of incapacity, misconduct or neglect entailed administrative rather than executive action (see paras [78]–[83]). Given the difference between this power and the Minister's s 8(c) power, it is not necessary to examine the correctness of the High Court's decision in *Sokhela*.

73 See, for example, *Grey's Marine* above fn 37 at para [24].

74 See *Ed-U-College* above fn 34 at para [21].

75 Garner (ed) *Black's Law Dictionary* (8ed) (Thomson West, St Paul 2004) at 235.

76 See, for example, *Union of Refugee Women and others v Director*: *Private Security Industry Regulatory Authority and others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) (*Union of Refugee Women*) at para [86].

77 See [3] above.

78 S 3(1) of the Armscor Act reads as follows:

> "The objectives of the Corporation are to meet –
>
> (a) the defence matériel requirements of the Department effectively, efficiently and economically; and
>
> (b) the defence technology, research, development, analysis, test and evaluation requirements of the Department effectively, efficiently and economically."

79 S 4(2)(a) and (f) of the Armscor Act.

80 *Id* s 4(2)(b).

81 *Id* s 4(2)(c) and (e).

82 *Id* s 4(2)(h).
83 *Id* s 4(2)(l).
84 *Id* s 4(2)(m).
85 As I believe that the reasons cited by the Minister in her correspondence to General Motau and Ms Mokoena were sufficient to demonstrate good cause, I do not consider it necessary to deal with the further reasons cited by the Minister for her decision in her papers in this Court and the High Court. In any event, I have reservations about whether it would be permissible for her to rely on these reasons as they were not relied on or disclosed when she took her decision (see in this regard Cachalia JA's judgment in *National Lotteries Board and others v South African Education and Environment Project and another* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) at paras [27]–[28] [also reported at [2012] 1 All SA 451 (SCA) – Ed]).
86 S 5(1)(a) of the Armscor Act read with s 3.
87 *Id* s 5(2)(c).
88 *Id* s 5(2)(d).
89 *Id* s 5(2)(e).
90 *Id* s 5(2)(f).
91 S 5(2)(g) of the Armscor Act provides that the service level agreement must "set out the rate at which [Armscor] may charge for its services." This is, however, not something which the Corporation is compelled to charge. The Armscor Act also provides for a number of funding mechanisms through which the Corporation may be funded. These include, *inter alia*, the appropriation of funds from Parliament and revenue derived from its investments (s 15 of the Armscor Act). It would thus be consistent with the statutory framework for Armscor to be funded solely by appropriation from Parliament and investment income rather than by way of a service charge.
92 S 6 of the Armscor Act, entitled "Corporation managed by Board of Directors", reads:
> "(1) The affairs of the Corporation are managed and controlled by a Board of Directors consisting of –
> (a) nine non-executive members;
> (b) two executive members, namely a Chief Executive Officer and a Chief Financial Officer.
> (2) The Board is the accounting authority for the Corporation as contemplated in section 49(2)(a) of the Public Finance Management Act."

93 S 7(1) and (2) of the Armscor Act, set out in [4] above.
94 S 7(6) of the Armscor Act reads:
> "A non-executive member of the Board must be paid out of the funds of the Corporation such remuneration for his or her services as the Minister, after consultation with the Minister of Finance, may determine."

95 See [15] above.
96 Her comment was to the effect that the failure to remove her would have created an expectation that she would be made Chairperson on General Motau's removal.
97 Ss 6(1) and 7(2) of the Armscor Act.
98 See in this regard *Democratic Alliance v President of the Republic of South Africa and others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para [27] and *Pharmaceutical Manufacturers Association of South Africa and another*: *In re*: *Ex parte President of the Republic of South Africa and others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para [85].
99 *Pharmaceutical Manufacturers id* at para [85].
100 On the importance of objective rather than subjective rationality in the context of assessing statutory standards, see *Democratic Alliance* above fn 98 at paras [14]–[26].
101 Review for reasonableness is about testing "the decision itself", whereas review for rationality is about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved – rationality is not about whether other means could have been used. Rationality review, as an evaluation of whether the "minimum threshold" for the exercise of public power has been met, involves judicial restraint. See in this regard *Democratic Alliance* above fn 98 at paras [29]–[32] and [42]–[43], relying on *Affordable Medicines Trust and others v Minister of Health and others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*).
102 71 of 2008.
103 This is reiterated by s 5(4) of the Companies Act, which deals with the situation where there is "inconsistency between any provision of this Act and a provision of any other national legislation". In the event of such inconsistency, s 5(4)(a) provides that "the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second".
104 That definition reads as follows:
> "[A]n enterprise that is registered in terms of this Act as a company, and either –
> (a) is listed as a public entity in Schedule 2 or 3 of the [Public Finance Management Act]; or
> (b) is owned by a municipality, as contemplated in the [Local Government: Municipal Systems Act], and is otherwise similar to an enterprise referred to in paragraph (a)."

105 1 of 1999.
106 The section, entitled "Modified application with respect to state-owned companies", reads as follows:
> "(1) Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3).
> (2) The member of the Cabinet responsible for –
> (a) state-owned companies may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies, any class of state-owned companies, or to one or more particular state-owned company; or
> (b) local government matters may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies owned by a municipality, any class of such enterprises, or to one or more particular such enterprises,
> on the grounds that those provisions overlap or duplicate an applicable regulatory scheme established in terms of any other national legislation.
> (3) The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (2) –
> (a) only to the extent that the relevant alternative regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and
> (b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act."

107 S 57(1) defines "shareholder" for the purposes of s 71 as including "a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached." The Minister is thus the shareholder of Armscor as she "exercises ownership control over the Corporation on

behalf of the State" (s 2(2)(b) of the Armscor Act).

108 For example, s 71(3), which relates to the dismissal of a director by the board, requires the board to determine that the director in question is ineligible or disqualified; incapacitated; or negligent or derelict in the performance of his or her functions.

109 *Sasol Synthetic Fuels (Pty) Ltd and others v Lambert and others* [2001] ZASCA 133; 2002 (2) SA 21 (SCA) (*Sasol v Lambert*) [also reported at [2002] JOL 9264 (SCA) – Ed].

110 *Id* at para [17].

111 *Id* and the authority cited there.

112 *Id* at para [15], quoting from *Kent NO v South African Railways and another* 1946 AD 398 at 405. See generally paras [16]–[17].

113 See, for example, Hoexter above fn 37 at 418; Murcott "Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?" (2013) 130 SALJ 260 at 271; and Price "The Evolution of the Rule of Law" (2013) 130 SALJ 649 at 654–655.

114 *Masetlha* above fn 50 at para [75].

115 *Id* at para [77].

116 *Id* at para [86].

117 *Id* at para [77].

118 *Albutt v Centre for the Study of Violence and Reconciliation and others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

119 *Id* at paras [61] and [68]–[72].

120 *National Director of Public Prosecutions and another v Mohamed NO and others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC). Ackermann J stated at para [37], relying on the Appellate Division's decision in *R v Ngwevela* 1954 (1) SA 123 (A) at 131H [also reported at [1954] 1 All SA 286 (A) – Ed] and the other cases referred to in fn 34 of that judgment, that:

> "[i]t is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the Legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it."

121 See, for example, *Administrator, Transvaal and others v Zenzile and others* [1990] ZASCA 108; 1991 (1) SA 21 (A) at 37A–G and 39A [also reported at [1991] 1 All SA 240 (A) – Ed]. See also *Administrator, Natal and another v Sibiya and another* [1992] ZASCA 115; 1992 (4) SA 532 (A) at 539B–C [also reported at [1992] 2 All SA 442 (A) – Ed].

122 S 172(1) of the Constitution reads as follows:

> "When deciding a constitutional matter within its power, a court –
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including –
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

See also *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para [42].

123 *Hoffmann id* at para [45]. See also *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para [96].

124 *Hoffmann* above fn 122 at para [45].

125 In *John v Rees* [1970] Ch 345 at 402 Megarry J observed:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. . . . Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

126 *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at paras [23]–[24] and [26].

127 I have in mind the Minister's letter of 19 February 2013 to General Motau, wherein she threatened dismissal over their repeated attempts to set the remuneration levels of Board members. S 7(6) of the Armscor Act reserves this for ministerial determination.

128 See [7] above.

129 See [52]–[68] above for the discussion on good cause.

130 See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para [94]. See generally M du Plessis *et al Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 135.

131 See para 81.6 of the High Court judgment above fn 1.

132 See [21] above. The High Court reasoned that the Minister's failure to observe the requirements of procedural fairness in making her decision to terminate the services of General Motau and Ms Mokoena was unreasonable. Even if this were the case – which the High Court failed to demonstrate sufficiently – it is not clear that it would justify the exceptional costs order the Court granted. The High Court's other reasons – that the Minister did not deal with General Motau's letter on 12 July 2013 which "displayed [his] respect" for her and the Minister's "utterances" in her meeting with the Board succeeding her decision on 14 August 2013 – similarly provide no exceptional basis to mulct the Minister with a punitive costs order.

133 Although s 8(c), in terms of which the Minister acted, speaks of termination of services, it is clear from its text that it deals with the termination of membership and not employment.

134 S 33(1) of the Constitution provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

135 S 3(1) of PAJA reads:

> "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

136 Main judgment above at [47].

137 *Id* at [49].

138 *Id* at [50].

139 *SARFU* above fn 28 at para [143].

140 See the definition of administrative action in PAJA.

141 The various sections of the Constitution mentioned here are all listed in the exclusions to the definition of administrative action in PAJA.
142 S 85(2)(a) reads:
"The President exercises the executive authority, together with the other members of Cabinet, by –
(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise."
143 *Metcash Trading Limited v Commissioner for the South African Revenue Service and another* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (*Metcash Trading*).
144 *Id* at para [42].
145 *SARFU* above fn 28 at para [143].
146 *Ed-U-College* above fn 34 at para [18].
147 *Grey's Marine Hout Bay* above fn 37 at para [27].
148 Above fn 34 at para [18].
149 *Ed-U-College* above fn 34 at para [21].
150 *SARFU* above fn 28 at para [147].
151 *SARFU* above fn 28 at para [142].
152 *Dawood* above fn 54.
153 *Id* at para [53].

Mansingh v General Council of the Bar and others
2014 (1) BCLR 85 (CC)

Division:	Constitutional Court of South Africa
Date:	28/11/2013
Case No:	**CCT43/13**
Before:	MTR Mogoeng Chief Justice, DE Moseneke Deputy Chief Justice, E Cameron, J Froneman, CN Jafta, MR Madlanga, BE Nkabinde, TL Skweyiya, JV van der Westhuizen, RM Zondo Justices and NZ Mhlantla Acting Justice

Advocate *– senior counsel status – conferral of – regardless of the historical origin of the conferral of senior counsel status being in a power that was formerly a prerogative power of the Crown, on a proper construction of section 84(2)(k) of the Constitution, the President's power to confer honours in terms of section 84(2)(k) includes the authority to confer Senior Counsel status or silk on advocates.*

Legal practitioners *– advocate – senior counsel status – conferral of – regardless of the historical origin of the conferral of senior counsel status being in a power that was formerly a prerogative power of the Crown, on a proper construction of section 84(2)(k) of the Constitution, the President's power to confer honours in terms of section 84(2)(k) includes the authority to confer Senior Counsel status or silk on advocates.*

President *– powers and functions – conferring honours – section 84(2)(k) of the Constitution – the President's power to confer honours in terms of section 84(2)(k) includes the authority to confer Senior Counsel status or silk on advocates.*

Editor's Summary

Section 84(2)(k) of the Constitution provides that "the President is responsible for conferring honours". In *Mansingh v President of the Republic of South Africa and others* 2012 (6) BCLR 650 (2012 (3) SA 192) (GNP), the High Court held that the President's responsibility of conferring honours does not include the power to confer the status of senior counsel on practising advocates. The General Council of the Bar and the Johannesburg Society of Advocates then appealed to the Supreme Court of Appeal. In *General Council of the Bar and another v Mansingh and others* [2013] 2 All SA 542 (2013 (3) SA 294) (SCA), the Supreme Court of Appeal reversed the order of the High Court and held that section 84(2)(k) of the Constitution does enable the President power to confer the status of senior counsel on practising advocates.

Applicant, a practising advocate, who had launched the original proceedings in the High Court approached the Constitutional Court seeking leave to appeal against the decision of the Supreme Court of Appeal.

The Constitutional Court in a unanimous judgment (*per* Nkabinde J) granted leave to appeal but dismissed the appeal with no order as to costs.

The case turned on the proper interpretation of the phrase "conferring honours". As the Supreme Court of Appeal had correctly found, the phrase connoted "something conferred or done as a token of respect or distinction; a mark or manifestation of high regard." This meaning was consistent with the dictionary definition of the word "honour". The concept of "honours" was linguistically wide enough to include the award of

silk status. Applicant had not provided a sufficient basis for excluding the conferral of silk from the ambit of the President's power under section 84(2)(k). She had not pointed to any features of the institution that warranted its exclusion from the broad understanding of "honours". The President's power to confer honours in terms of section 84(2)(k) included the authority to confer Senior Counsel status or silk on advocates. The appeal therefore fell to be dismissed.

Judgment

Nkabinde J:

Introduction

[1] This is an application for leave to appeal against the decision of the Supreme Court of Appeal[1] setting aside the order of the North Gauteng High Court, Pretoria[2] ("High Court"). The applicant successfully launched proceedings in the High Court, and obtained declaratory relief that section 84(2)(k) of the Constitution does not authorise the President of the Republic ("President") to confer the status of Senior Counsel on advocates. The High Court ordered the President and the Minister of Justice and Constitutional Development ("Minister") to pay the applicant's costs. It granted leave to the General Council of the Bar ("GCB") and the Johannesburg Society of Advocates ("JSA")[3] who, after unsuccessfully seeking leave to appeal directly to this Court,[4] appealed to the Supreme Court of Appeal. The Supreme Court of Appeal reversed the High Court's decision and concluded that the Constitution does empower the President to confer, as an honour, Senior Counsel status on advocates.

[2] At the heart of the dispute lies the correct interpretation of section 84(2)(k),[5] in particular, whether the President has the power under that section to confer silk or Senior Counsel[6] ("SC") status on advocates. It must be acknowledged at the outset that this case is not about whether the institution of silk or SC status is good or bad, or whether it is worthy of protection. Nor is it about the merits of the applicant's own unsuccessful applications for SC status.

Parties

[3] The applicant, Ms Urmilla Roshnee Devi Mansingh, is a practising advocate and member of the JSA.[7] The GCB and JSA, first and second respondents respectively (collectively referred to as "respondents"), are professional legal associations with corporate personality whose membership primarily consists of practising advocates.

Historical context and constitutional scheme

[4] It is convenient to set out briefly the historical background on the powers of the President regarding the conferral of honours and the constitutional framework.[8] Prior to 1994, following the Westminster model, the "royal prerogative" was a source of power for South African heads of state derived not from the Constitution or other statutes but from the common law.[9] Historically, the conferral of silk was considered an exercise of the "honours prerogative" under the English law received into South African law under the Union Constitution of 1910.[10]Section 7 of the Republic of South Africa Constitution Act[11] went further and expressly reserved this aspect of the prerogative power for the President.[12] These specific powers

of the Crown have been described as a partial codification of the prerogative powers.[13]Section 6 of the Republic of South Africa Constitution Act[14] retained the prerogative powers of the executive in terms similar to those of its predecessor, section 7(3) and (4).

[5] The powers and functions of the President in the interim Constitution[15] were set out in section 82(1).[16] This section provided, in subsection (1)(e), that the President was competent to exercise the power "to confer honours". The section 82(1) powers had their origin in the prerogative powers exercised under the Constitutions of 1910, 1961 and 1983 by South African heads of State. Other than the powers in that section, there were no other powers conferred upon the President derived from the royal prerogative.[17]

[6] Similarly, Chapter 5 of the Constitution[18] provides for the powers and functions of the President and the national executive. Section 84 of the Constitution provides, in relevant part:

> "(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
>
> (2) The President is responsible for –
>
> . . .
>
> (k) conferring honours."

Litigation background

High Court

[7] The applicant sought relief declaring that section 84(2)(k) does not authorise the President to confer SC status or silk on advocates.[19] The High Court, relying on its interpretation of the 1961 and 1983 Constitutions, found that the President, acting as Head of State, retained under those constitutions "such powers and functions as were possessed by the Queen and State President by way of prerogatives prior to the commencement of the 1961 and 1983 Constitutions, respectively".[20] The Court analysed the origins of the institution of silk and attached weight to the fact that the prerogative of appointing King's Counsel ("KC") or Queen's Counsel ("QC")[21] rested solely with the monarch.[22] It recognised that the Constitution "makes a clean break with the past" and held that the appointment of silk does not fall within the meaning of "conferring honours" in terms of section 84(2)(k).[23]

Supreme Court of Appeal

[8] On appeal by the respondents, the Supreme Court of Appeal, *per* Brand JA, defined the issue in narrow terms, finding that the question whether SC status could be conferred by the President turned exclusively on the interpretation of section 84 of the Constitution.[24] The Court upheld the appeal. It held that section 84(2)(k) empowers the President to confer, as an honour, SC status on advocates. The Court held that there is nothing in the historical or broader context that is at odds with the interpretation that

section 84(2)(k) includes the authority to confer SC status on practising advocates.[25]

[9] The Court held that constitutional provisions must be construed purposively and in a contextual manner and that courts are simultaneously constrained by the language used. It held that courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[26] but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene", which includes the political and constitutional history leading up to the enactment of a particular provision. [27] The Supreme Court of Appeal held that "what lies at the heart of the conferral of silk is the recognition by the President as the Head of State, of the esteem in which the recipients of silk are held in their profession by reason of their integrity and of their experience and excellence in advocacy."[28]

[10] The High Court relied on National Orders, for example the Order of the Baobab and the Order of Luthuli, to determine the characteristics of an honour. But the Supreme Court of Appeal held that there is no basis to treat this class of honours as definitive of what is capable of being described as an honour in the constitutional sense.[29] The respondents raised the alternative argument that even if the conferral of silk cannot be accommodated under the honours power in section 84(2)(k), it is authorised by section 84(1) as an auxiliary power necessary to carry out a function of the President as Head of State. The Supreme Court of Appeal made no finding on this. The Court stated that it follows, on a purely linguistic basis, that the concept of honours bears a meaning wide enough to include the conferral of silk. It upheld the appeal, set aside the declaratory relief granted by the High Court and replaced it with an order dismissing the application.

In this Court

[11] The applicant seeks leave to appeal against the decision of the Supreme Court of Appeal. Contending that the interpretation by the High Court is correct, she submits that the interim Constitution did not preserve the former prerogative powers encapsulated in the 1961 and 1983 Constitutions. The applicant argues that the President, acting as Head of State

under the interim Constitution, enjoyed the power to confer honours and that the Constitution adopts the same approach in section 84(2). This power to confer honours, she contends, does not extend to granting silk or SC status.

[12] The respondents oppose the application and contend that the Supreme Court of Appeal's interpretation is correct, that the appeal has no prospects of success and that leave to appeal should be refused. They raise the alternative argument that under section 84(1) of the Constitution the conferral of silk could be understood as an auxiliary power necessary to carry out a function of the President as Head of State. In the view I take of the matter, it will not be necessary to decide this.

Issues

[13] The central issue is whether the President's power to confer honours under section 84(2)(k) includes the power to confer silk on advocates. This raises the question whether the conferral of the status of silk is an honour. A determination of this issue and the question that arises therefrom requires an interpretation of the word "honours".

Should leave to appeal be granted?

[14] The issue raised concerns the President's power under the Constitution to confer honours on advocates. Fundamental to the principle of legality is the proper source of the public power exercised by the President under the Constitution.[30] The interpretation of the Constitution is of considerable importance beyond the parties before this Court.[31] It is thus in the interests of justice to grant leave to appeal.

Does the power under section 84(2)(k) include the conferral of silk?

[15] In deciding whether the President's power to confer honours under section 84(2)(k) includes the power to confer silk, it is important to understand the meaning of the phrase "honour". The applicant raised various arguments in support of her submission that the interpretation adopted by the Supreme Court of Appeal was incorrect.[32] Most of those contentions are based on factual allegations that have no relevance to the issue at hand. The irrelevance of these factual allegations was conceded by the applicant in oral argument.

[16] It is necessary to establish the correct interpretive approach. The Constitution is the supreme law of the Republic.[33] This Court has given approval to an interpretive approach that, while paying due regard to the

language and the context, is generous and purposive and gives expression to the underlying values of the Constitution.34 The President's power to confer honours, as with all other exercises of public power, is subject to the rule of law and, as a matter of course, must be defined within permissible constitutional boundaries. This Court is charged with determining the boundaries when interpreting the section.

[17] The applicant challenges the Supreme Court of Appeal's approach, contending that the Court asked the wrong question. She incorrectly contends that there is no purposive interpretation that would "necessitate" including silk within the concept of honours. The Supreme Court of Appeal held that the ordinary meaning of the term "honours" is "wide enough" to encompass the award of silk. There is, in my view, no difficulty with the approach taken by the Supreme Court of Appeal, including its remark that, when adopting the purposive and contextual approaches, courts are simultaneously constrained by the plain language used in the section.35 The constitutional context preceding the enactment of the provision in question is also important in determining the scope and purpose of the provision.

Meaning, ambit and scope of "honours"

[18] Although it is not sufficient to focus only on the textual meaning of the phrase, the text is the starting point of construction.36 As the Supreme Court of Appeal correctly found, the phrase connotes "something conferred or done as a token of respect or distinction; a mark or manifestation of high regard."37 This meaning is consistent with the dictionary definition of the word "honour", to which the dictionary adds "especially a position or title of rank, a degree of nobility, a dignity."38

[19] The applicant, however, argues that dictionary definitions are of little assistance. She contends that the correct enquiry is not whether the word's meaning is wide enough to include a particular practice, but only whether that *practice* falls within the word's ordinary meaning.

[20] The applicant further argues that the concept of an "honour" must be interpreted on the basis of general characteristics drawn from the current list of National Orders. She contends that since the institution of silk does not share these characteristics, it is not an "honour". I do not agree. This interpretation ignores the textual meaning of the word "honours". That meaning is indeed wide.

[21] The applicant maintains that the phrase "conferring honours" cannot mean an act of the President that results in an individual being accorded greater respect or honour by society than he or she had before. She argues, therefore, that section 84(2)(k) empowers the President to express the country's admiration or thanks for some past act or achievement, considered to be of such significance as to be worthy of recognition by the country as a whole. The applicant limits the power further by characterising, for example, the purpose,39 form40 and intention41 with which the honour-conferring power is exercised. Although the applicant admits that the honours "are not a closed list of honours", she does not clarify the proposed narrowly defined power of conferring honours. Nor does she say why the phrase "honours", when properly construed, may not be used for accomplishment in other areas.

[22] The narrowly defined power suggested by the applicant also ignores the contextual scene. The history of the power to confer honours is relevant to its present-day meaning. While the historical context may not be decisive, it is valuable in determining the meaning of the term "honours". However, sight should not be lost of the fact that the Constitution made a clean break from the past and that ordinarily its text must thus be interpreted on its own terms. These remarks were echoed by this Court in *First Certification*42 in relation to the power to pardon in section 84(2)(j) of the Constitution. The Court said:

> "The power of the South African Head of State to pardon was originally derived from royal prerogatives. It does not, however, follow that the power given in the NT [New Text] 84(2)(j) is identical in all respects to the ancient royal prerogatives. Regardless of the historical origins of the concept, the President derives this power not from antiquity but from the NT itself. It is [the] Constitution that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine any provision of the NT, that conduct would be reviewable."43 (Footnote omitted.)

[23] Historically, the conferral of silk was considered an exercise of the "honours prerogative" under the English law, which was received into South African law under the Union Constitution. The Head of State

possessed both a codified honour-conferring power and an unspecified, residual prerogative power. The section 82(1) powers of the interim Constitution had their origin in the prerogative powers exercised under the 1961 and 1983 Constitutions by South African Heads of State.44 These powers included the power to confer honours. However, as with the interim Constitution, which did not preserve the residual prerogative powers in a catch-all provision and which vested the President with the former prerogative powers of the Crown,45 the Constitution makes no express reference to prerogative powers.

[24] The Constitution, under section 84(2), codifies some of the powers that were formerly prerogative powers of the Crown. There are no compelling purposive or historical reasons why the President's powers should be shackled to the prerogative powers. That would bind him to the past, rather than allow him to break with it to the extent necessary under our new democratic dispensation.

[25] It is noteworthy that the President, in performing the functions as Head of State, in contrast to those as head of the executive, acts alone. This much is clear from the wording of section 84(2).46 As the Constitution is the primary source of presidential power, the President may exercise only those powers conferred on him or her by the Constitution, or by law that is consistent with the Constitution.47 It sets out that when exercising presidential power, the President does so either as Head of State or head of the national executive. Any

conduct beyond that envisaged by the Constitution will be beyond his powers and invalid.

[26] The Supreme Court of Appeal also relied on the report of the panel of experts that informed and advised the Constitutional Assembly in the formulation of the Constitution. The Court remarked:

> "The general intent of the drafters of the Constitution therefore seems to be plain. Insofar as executive powers derived from the royal prerogative were not incompatible with the new constitutional order, they should be codified and maintained. Conversely stated, the intention was not to abolish prerogative powers or to diminish the function of the head of state previously derived from the royal prerogative, but to codify these powers insofar as they are not inimical to the constitutional state and to render the exercise of these powers subject to the Constitution. *In this light the historical perspective therefore seems to support the appellants' argument that the power to 'confer honours' contemplated in section 84(2)(k) of the Constitution must be afforded its traditional content, which included the power to appoint silks.*"48 (Emphasis added.)

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[27] It is well-established that courts need not look to the drafter's intention when engaging in constitutional (or statutory) interpretation.49 However, as stated above, we must adopt a purposive reading of section 84(2)(k). When there is documentary evidence regarding that purpose, we may, in appropriate circumstances, have regard to such evidence – the *travaux préparatoires*.50 To the extent that the intention of the panel of experts is relevant, it supports the reasoning set out above.51 Indeed, as this Court, *per* Chaskalson P, pointed out in *S v Makwanyane*:52

> "Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. The final draft adopted by the forum of the Multi-Party Negotiating Process was, with few changes, adopted by Parliament. The Multi-Party Negotiating Process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the *travaux préparatoires* relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it."53

The Court further remarked:

> "Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that *where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution*. These conditions are satisfied in the present case."54 (Emphasis added.)

[28] The President's section 84(2) powers should also be viewed against the background of the executive functions set out in section 8355 of the Constitution, which acts as a catch-all provision to ensure that the President has all the power necessary to carry out the functions that he or she is given under the Constitution or legislation.56 The President, acting as Head

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of State and head of the national executive, is duty-bound to uphold the Constitution as the supreme law of the Republic, to promote the unity of the nation and to advance the interests of the Republic.57 The wording of section 84(2) is both permissive and broad, affording a wide discretion to the President. As the President holds a position both as Head of State and as head of the national executive, he or she has power to confer honours on any category of persons. Counsel for the JSA made this point during the hearing, and I cannot find fault with that line of argument. The applicant fails to explain why these permissive powers should be limited in the way she contends. The contextual setting of the power to confer silk thus plays an important role in determining what constitutes an "honour" in terms of section 84(2)(k).

Is silk or SC status an honour?

[29] The concept of "honours" is linguistically wide enough to include the award of silk status. A purposive reading of section 84(2)(k), taken together with the historical context, reaches the same conclusion. This is so because the award simply honours its recipients for attaining a high level of professional skill and excellence.58

[30] The applicant contends that the Supreme Court of Appeal erred in failing to consider properly the true character of SC status as a certification of professional quality, when the Court viewed it as a form of recognition of the regard in which certain advocates are held by their peers. Silk or SC status, she argues, is awarded by letters patent, which are a classical form of certification of professional quality. The characterisation of the conferral of silk as a certificate of excellence issued by the President at the instance of the Bar is without merit.

[31] The applicant relied on a number of authorities59 (foreign and domestic) for the proposition that the "granting of the patent of appointment as senior counsel is not an honour, no more than was the granting of the patent of appointment as Queen's or King's Counsel in the past. Technically, it remains as it was: an executive act for administrative purposes."60 However, this assertion fails to capture the true nature of the President's honour-conferring power.

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[32] The conferral of silk may assist in the administration of justice by aiding in the proper functioning of the legal system.[61] And this Court cannot ignore the reality that applicants for SC status initiate the process and that some may consider appointment an important step in their professional advancement. But that is not all. The respondents emphasise that being appointed silk serves as recognition by the President of the esteem in which the recipients are held "by reason of their integrity and of their experience and excellence in advocacy."[62]

[33] The applicant has not provided sufficient basis for excluding the conferral of silk from the ambit of the President's power under section 84(2)(k). She has not pointed to any features of the institution that warrant its exclusion from the broad understanding of "honours" adopted above. The applicant's argument that the correct enquiry is not whether the word's meaning is wide enough to include a particular practice, but only whether that practice falls within the word's ordinary meaning, misses the point. It cannot be gainsaid, when regard is had to the literal meaning of the word "honours", that the President's power to confer honours is wide enough to include the conferral of silk or the National Orders.

[34] The applicant relies on the Canadian cases *Lenoir*[63] and *Ontario*.[64] As correctly argued by the JSA, the Privy Council in *Ontario* held that the status of QC was both an honour and an office. This reasoning was consistent with the finding of the Canadian Supreme Court in *Lenoir* that the appointment of silk amounted to the conferral of an honour. The applicant contends that the conferral of silk falls sufficiently within the definitional scope of a title pertaining to an "office" – a position, duty or post held for professional reasons – to exclude it from being designated an honour. Her argument is premised on the understanding that historically there were prerogative powers to confer offices, and prerogative powers to confer honours.

[35] The Constitution only codifies the latter, she contends, and does not therefore empower the President to confer silk because silk amounts to an appointment to office. The respondents on the other hand submit that, properly construed, one's appointment as a silk falls comfortably within

the realm of an honour, in the sense that its conferral amounts to an appreciation by an advocate's peers of his or her forensic skill as well as the esteem in which he or she is held. At its best, the applicant's case acknowledges the composite nature of the award of silk, and these authorities simply provide further support for this finding.

[36] It is further contended by the applicant that section 84(2)(k) must be interpreted with due regard to the values of human dignity, equality and the rule of law. The applicant argues that a construction authorising the President to act in a manner inimical to these values should be avoided. Notionally, the applicant's argument is correct. However she concedes, correctly in my view, that the purported right-infringing effects of the institution of silk are not issues with which we are concerned here.

[37] The Supreme Court of Appeal was correct in the way it disposed of the applicant's reliance on sections 9[65] and 22[66] of the Constitution. It noted that, if silk indeed infringed those rights, that would be dispositive of the matter and there would be no need to enquire into the power of the President to confer the honour of silk. In any event, the applicant's contention concerning the alleged infringement of the Bill of Rights is an entirely separate question to whether the President in fact possesses such power. Crucially, whether and to what extent the institution has an effect on rights cannot determine whether and to what extent it may properly be regarded as an "honour".

Conclusion

[38] I conclude that the President's power to confer honours in terms of section 84(2)(k) includes the authority to confer SC status or silk on advocates. The appeal must, therefore, be dismissed.

Order

[39] The following order is made:

1. Leave to appeal is granted.

2. The appeal is dismissed.
3. There is no order as to costs.

(Mogoeng CJ, Moseneke DCJ, Cameron, Froneman, Jafta, Madlanga, Skweyiya, Van der Westhuizen, Zondo JJ and Mhlantla AJ concurred in the judgment of Nkabinde J.)

For the applicant:

N Cassim SC, *E Fagan* SC and *M Ramaepadi* instructed by *Saders Attorneys*

For the first respondent:

W van der Linde SC, *I Maleka* SC, *A Stein* and *K McLean* instructed by *Gildenhuys Lessing Malatji Incorporated*

For the second respondent:

W Trengove SC, *A Cockrell* SC, *S Cowen* and *M Sikhakhane* instructed by *Mkhabela Huntley Adekeye Incorporated*

The following cases were referred to in the above judgment:

South Africa

Chairperson of the Constitutional Assembly, *Ex parte*: *In re* Certification of the Constitution of the Republic of South Africa 1996 1996 (10) BCLR 1253 ([1996] ZACC 26; 1996 (4) SA 744) (CC) – **Referred to** 93

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others 2010 (2) BCLR 157 ([2009] ZASCA 106; 2010 (2) SA 554) (SCA) – **Referred to** 90

Competition Commission v Loungefoam (Pty) Ltd and others 2012 (9) BCLR 907 ([2012] ZACC 15) (CC) – **Referred to** 91

Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others 1996 (4) BCLR 441 ([1996] ZACC 27; 1996 (2) SA 621) (CC) – **Referred to** 92

General Council of the Bar and another v Mansingh and others [2013] 2 All SA 542 ([2013] ZASCA 9; 2013 (3) SA 294) (SCA) – **Confirmed on appeal** 86

Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: *In re* Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others 2000 (10) BCLR 1079 ([2000] ZACC 12; 2001 (1) SA 545) (CC) – **Referred to** 90

Jaga v Dönges NO and another; Bhana v Dönges NO and another [1950] 4 All SA 414 (1950 (4) SA 653) (A) – **Referred to** 90

Mansingh v President of the Republic of South Africa and others 2012 (6) BCLR 650 ([2012] ZAGPPHC 3; 2012 (3) SA 192) (GNP) – **Not approved** 86

Matatiele Municipality and others v President of the Republic of South Africa and others (No 2) 2007 (1) BCLR 47 ([2006] ZACC 12; 2007 (6) SA 477) (CC) – **Referred to** 92

Minister for Justice and Constitutional Development v Chonco and others 2010 (2) BCLR 140 ([2009] ZACC 25; 2010 (4) SA 82) (CC) – **Referred to** 91

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Mohamed and another v President of the Republic of South Africa and others (Society for the Abolition of the Death Penalty in South Africa and another Intervening) 2001 (7) BCLR 685 ([2001] ZACC 18; 2001 (3) SA 893) (CC) – **Referred to** 87

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 ([2012] ZASCA 13; 2012 (4) SA 593) (SCA) – **Referred to** 95

Pharmaceutical Manufacturers Association of SA and another: *In re Ex parte* President of the Republic of South Africa and others 2000 (3) BCLR 241 ([2000] ZACC 1; 2000 (2) SA 674) (CC) – **Referred to** 94

President of the Republic of South Africa and another v Hugo 1997 (6) BCLR 708 ([1997] ZACC 4; 1997 (4) SA 1) (CC) – **Referred to** 88

President of the Republic of South Africa and others v South African Rugby Football Union and others 1999 (10) BCLR 1059 ([1999] ZACC 11; 2000 (1) SA 1) (CC) – **Referred to** 94

S v Makwanyane and another 1995 (6) BCLR 665 ([1995] ZACC 3; 1995 (3) SA 391) (CC) – ***Dicta* at paras [12]–[17] approved** 95

S v Zuma and others 1995 (4) BCLR 401 ([1995] ZACC 1; 1995 (2) SA 642) (CC) – **Referred to** 92

Sachs v Donges NO [1950] 2 All SA 373 (1950 (2) SA 265) (A) – **Referred to** 87

Union Government v Tonkin 1918 AD 533 – **Referred to** 87

Viking Pony Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and another 2011 (2) BCLR 207 ([2010] ZACC 21; 2011 (1) SA 327) (CC) – **Referred to** 92

Canada

Attorney-General for the Dominion of Canada v Attorney-General for the Province of Ontario [1898] AC 247 (Ontario) – **Referred to** 97

Lenoir v Ritchie [1879] 3 SCR 575 – **Referred to** 97

United Kingdom

Minister of Home Affairs and another v Fisher and another [1979] 3 All ER 21 (PC) – **Referred to** 92

Footnotes

1 *General Council of the Bar and another v Mansingh and others* [2013] ZASCA 9; 2013 (3) SA 294 (SCA) (Supreme Court of Appeal judgment) [also reported at [2013] 2 All SA 542 (SCA) – Ed]. The applicant does not seek leave to appeal against the order of the Supreme Court of Appeal insofar as it ordered the President and Minister of Justice and Constitutional Development to pay the costs of the application dismissed by the Supreme Court of Appeal.

2 *Mansingh v President of the Republic of South Africa and others* [2012] ZAGPPHC 3; 2012 (3) SA 192 (GNP) (High Court judgment) [also reported at 2012 (6) BCLR 650 (GNP) – Ed].

3 In the High Court, the GCB and JSA were cited as the third and fourth respondents, respectively. The President, Minister, Independent Association of Advocates of South Africa ("IAASA") and the Law Society of South Africa ("LSSA") were cited as the first, second, fifth and sixth respondents, respectively. The President and the Minister abided the decision of the Court on appeal.

4 The application for leave to appeal directly to this Court was dismissed, in terms of an order issued on 19 March 2012, because it was not in the interests of justice for this Court to hear the matter in light of the pending litigation before the Supreme Court of Appeal.

5 S 84 of the Constitution deals with the powers and functions of the President and provides, in subsection (2)(k), that "[t]he President is responsible for conferring honours."

6 That is, the internal division of the Bar into senior and junior advocates.

7 The applicant was admitted in terms of the Admission of Advocates Act 74 of 1964. Advocate Mansingh is also a practising barrister and member of the Bar of England and Wales.

8 For a useful analysis of the historical development of the institution of silk in this country, see the Supreme Court of Appeal judgment above fn 1 at para [17], where the Court noted:

> "The early history of the institution in South Africa is somewhat obscure, not only by dearth of any judicial pronouncement but also because academic articles on the subject . . . prove to be more narrative in nature than based on real in-depth research. Yet it appears . . . that silks were appointed in the Cape from the 1880s, in Natal from the [1900s] and that by Union of the former British colonies in 1910 'all four colonies were wedded to the institution of senior counsel'."

See also Arnheim "Silk, Stuff and Nonsense" (1984) 101 *SALJ* 376; Kahn "Silks" (1974) 91 *SALJ* 95 at 96–9; and May *The South African Constitution* (3ed) (Juta & Co., Ltd, Cape Town 1955) at 176–9.

9 See *Mohamed and another v President of the Republic of South Africa and others* (*Society for the Abolition of the Death Penalty in South Africa and another Intervening*) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at paras [31]–[32].

10 Union of South Africa Act, 1909 (Union Constitution). Kahn notes that from 1910 silks were appointed by the Governor General. But the source of the Governor General's power to do so is a matter of inference. S 8 of the Union Constitution provided that the executive authority of the Union vested in the King, and was exercised by His Majesty, in person, or by the Governor General, as his representative. The executive powers conferred included the prerogative powers of the King. I am persuaded by the finding of the Supreme Court of Appeal that the Governor General's power to appoint Senior Counsel did not derive from any South African statute and that the authority to do so could only have been derived from an exercise of the royal prerogative to confer honours. See Kahn above fn 8 and *Sachs v Donges NO* 1950 (2) SA 265 (A) at 308 [also reported at [1950] 2 All SA 373 (A) – Ed] and *Union Government v Tonkin* 1918 AD 533.

11 32 of 1961.

12 S 7 of the 1961 Constitution provided, in relevant part:

> "(1) The head of the Republic shall be the State President.
> . . .
> (3) He shall, subject to the provisions of this Act, have power –
> . . .
> (c) *to confer honours*;
> . . .
> (4) The State President shall in addition as head of the State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative." (Emphasis added.)

13 Supreme Court of Appeal judgment above fn 1 at paras [21]–[22].

14 110 of 1983. S 6 of the 1983 Constitution provided, in relevant part:

> "(3) The State President shall, subject to the provisions of this Act, have power –
> . . .
> (b) *to confer honours*;
> . . .
> (4) The State President shall in addition as head of the State have such powers and functions as were immediately before the commencement of this Act possessed by the State President by way of prerogative." (Emphasis added.)

15 The Constitution of the Republic of South Africa Act 200 of 1993.

16 S 82(1) of the interim Constitution read:

> "The President shall be competent to exercise and perform the following powers and functions, namely –
> (a) to assent to, sign and promulgate Bills duly passed by Parliament;
> (b) in the event of a procedural shortcoming in the legislative process, to refer a Bill passed by Parliament back for further consideration by Parliament;
> (c) to convene meetings of the Cabinet;
> (d) to refer disputes of a constitutional nature between parties represented in Parliament or between organs of state at any level of government to the Constitutional Court or other appropriate institution, commission or body for resolution;
> (e) to confer honours;
> (f) to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
> (g) to appoint commissions of enquiry;
> (h) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any other law;
> (i) to negotiate and sign international agreements;
> (j) to proclaim referenda and plebiscites in terms of this Constitution or an Act of Parliament; and
> (k) to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem

fit, and to remit any fines, penalties or forfeitures."

17 In this regard see *President of the Republic of South Africa and another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para [8]. The 1983 Constitution made specific mention of some of the powers now contained in s 84 of the Constitution. These included, *inter alia*, the power to confer honours, pardon and reprieve offenders, and to enter into and ratify international treaties. This codification, completed with the interim Constitution, means that there is no express reference to prerogative powers and that those powers of the President which originated from the royal prerogatives are to be found in s 84. See *Hugo* at paras [6]–[7].
18 The Constitution of the Republic of South Africa, 1996.
19 High Court judgment above fn 2 at paras [1] and [53.1].
20 *Id* at para [17].
21 In England the rank QC, formerly KC, is awarded to advocates and attorneys (barristers and solicitors) who have demonstrated particular skill and expertise in the conduct of advocacy. It has been awarded in various forms, including the rank of QC *honoris causa* (meaning "for the sake of honour" or simply "as an honour") as opposed to the award of QC status as a substantive, professional rank. Honours are awarded to deserving and high-achieving people from every section of the community, for merit, service and bravery.
22 High Court judgment above fn 2 at para [16].
23 *Id* at paras [23] and [49].
24 Supreme Court of Appeal judgment above fn 1 at para [4].
25 *Id* at paras [27], [30] and [34].
26 *Id* at para [10], referring to *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors* (*Pty*) *Ltd and others: In re Hyundai Motor Distributors* (*Pty*) *Ltd and others v Smit NO and others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para [24].
27 *Id* at para [11], referring to *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para [39] [also reported at 2010 (2) BCLR 157 (SCA) – Ed], which quoted *Jaga v Dönges NO and another*; *Bhana v Dönges NO and another* 1950 (4) SA 653 (A) at 664G–H [also reported at [1950] 4 All SA 414 (A) – Ed].
28 *Id* at para [7].
29 *Id* at para [30].
30 See *Minister for Justice and Constitutional Development v Chonco and others* [2009] ZACC 25; 2010 (4) SA 82 (CC); 2010 (2) BCLR 140 (CC) at para [27]. As this Court stated in *Competition Commission v Loungefoam* (*Pty*) *Ltd and others* [2012] ZACC 15; 2012 (9) BCLR 907 (CC) at para [16], issues concerning the power and functions of an organ of state are indisputably constitutional matters.
31 The application is brought not only in the applicant's personal interest or the interests of the group to which she belongs – a group of advocates and attorneys opposed to the institution of silk – but also in the interest of the public at large.
32 The factual allegations include arguments regarding presidential credentials for the exercise of the power, the nature of SC status (to the extent that it represents professional advancement), selection criteria, the exercise of the power in the conferral of silk, the merits and demerits of the practice and the benefits associated with the conferral.
33 S 2 of the Constitution.
34 *Ferreira v Levin NO and others*; *Vryenhoek and others v Powell NO and others* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para [46]. See *Minister of Home Affairs and another v Fisher and another* [1979] 3 All ER 21 (PC) at 25H, cited in *S v Zuma and others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para [14]. See also *Viking Pony Pumps* (*Pty*) *Ltd t/a Tricom Africa v Hidro-Tech Systems* (*Pty*) *Ltd and another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) at para [32] and Supreme Court of Appeal judgment above fn 1 at para [10].
35 Supreme Court of Appeal judgment above fn 1 at para [29].
36 See *Matatiele Municipality and others v President of the Republic of South Africa and others* (*No 2*) [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para [37].
37 Supreme Court of Appeal judgment above fn 1 at para [12].
38 *New Shorter Oxford English Dictionary* (Clarendon Press, Oxford 2004).
39 The achievement, she argues, would be one which has benefited the country at large or is such as to warrant the admiration of the country as a whole.
40 The achievement would typically be one of extraordinary significance, awarded in circumstances where the recipient has gone beyond the call of duty.
41 The system would be entirely non-mercenary and is not intended to confer private advantage on the recipient.
42 *Ex parte Chairperson of the Constitutional Assembly*: *In re Certification of the Constitution of the Republic of South Africa 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification*).
43 *Id* at para [116]. See also *Hugo* above fn 17 at para [13].
44 See the discussion of South Africa's constitutional background at [4]–[5] above.
45 The former prerogative powers are contained in ss 7(4) and 6(4) of the 1961 and 1983 Constitutions respectively.
46 While the President must make the final decision when acting as Head of State, this Court has held that "it is not inappropriate for him or her to act upon the advice of the Cabinet and advisers." See *President of the Republic of South Africa and others v South African Rugby Football Union and others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para [41].
47 See *Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras [17]–[20].
48 Supreme Court of Appeal judgment above fn 1 at para [26].
49 See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at paras [17]–[26] [also reported at [2012] 2 All SA 262 (SCA) – Ed].
50 The "*travaux préparatoires*" (preparatory works) constitute the official documents recording the negotiations, drafting and discussions during the process of creating a legal instrument or constitution.
51 See *S v Makwanyane and another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras [12]–[19].
52 *Id*.
53 *Id* at para [17].
54 *Id* at para [19].
55 S 83 provides that the President –

> "(a) is the Head of State and head of the national executive;
> (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
> (c) promotes the unity of the nation and that which will advance the Republic."

56 See Murray and Stacey "The President and the National Executive" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2ed) (RS 5) at 18–6.

57 *Hugo* above fn 17 at para [65].
58 Supreme Court of Appeal judgment above fn 1 at para [12]. Senior counsel status or silk, according to the JSA, is to be understood as a high honour conferred on an individual by the Head of State. The Bar states that this dimension of silk is at the heart of the concept and ought not in any way to be undervalued. The recommendation by the Bar to the President is conveyed through the intermediation of the Judge President and the Minister. According to the Cape Bar Council's Guidelines for Silk Applications – 2010, the conferral of silk is recommended only for applicants who are regarded as deserving of senior status by reason of their notable and widely recognised industry, professional competence and advanced ability, as well as their established reputation for personal and professional integrity.
59 See authorities referred to at fn 8 above.
60 Kahn above fn 8 at 104.
61 According to Kennedy and Schlosberg, writing in 1935, the appointment of Senior Counsel amounts to an executive act, which appointment must not be regarded as one conferring honour from the Crown. They argue it amounts to "an executive act concerning the internal government of the country, necessary for certain executive purposes, but what they are it is impossible to say". Kennedy and Schlosberg *The Law and Custom of the South African Constitution* (Oxford University Press, London 1935) at 128. Historically, other commentators have suggested that the position of QC was, in principle, the same as that of the Attorney-General (or Director of Public Prosecutions) to the extent that such advocate held an office or position under the Crown. See Author Unknown "Notes" (1901) 18 *SALJ* 117 at 117. The Supreme Court of Appeal, too, noted that the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice. Supreme Court of Appeal judgment above fn 1 at para [31].
62 Supreme Court of Appeal judgment above fn 1 at para [7].
63 *Lenoir v Ritchie* [1879] 3 SCR 575.
64 *Attorney-General for the Dominion of Canada v Attorney-General for the Province of Ontario* [1898] AC 247 (*Ontario*).
65 S 9 provides:
"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."
66 S 22 provides:
"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."